

No. 15348

United States
Court of Appeals
for the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,

Appellant,

vs.

PORTER BARRETT,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division.

FILED

FEB 27 1957

PAUL P. O'BRIEN, C

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LOUIS M. WELSH, ESQ.,
510 South Spring Street,
Los Angeles 13, California.

For Appellee:

ERWIN P. WERNER, ESQ.,
215 West 7th Street,
Los Angeles 14, California.

United States District Court, Southern District of
California, Central Division

No. 19270-WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

AMENDED ACTION FOR DAMAGES
(Personal Injuries)

Leave of court having been first obtained, the
plaintiff files this, his amended complaint.

I.

That at all times mentioned herein, the defend-
ant was and now is a corporation, organized under
the Laws of Kansas, and is authorized to and does
business in the State of California. That further,
the defendant was and now is the owner of, and
operates, a railway system between the terminals
of Chicago, Illinois, and the City of Los Angeles,
and at all times was and now is a common carrier.
That further, at the times mentioned in this com-
plaint the plaintiff and defendant were both en-
gaged in the furtherance of commerce between the
States and foreign countries.

II.

That at the times mentioned in this complaint, the plaintiff was employed by said defendant, as a waiter, on a transcontinental passenger train designated the "Super Chief" and said train was at all times mentioned herein [2*] transporting mail, baggage and passengers between the states and foreign countries.

III.

This court has jurisdiction over the persons and subject matter of this cause of action by reason of the provisions of the Employers Liability Act adopted by the Congress of the United States.

IV.

That on or about the 11th day of March, 1955, while the plaintiff was engaged in his duties as a waiter on the train as aforesaid, the defendant, through its agents and employees, carelessly and negligently caused a large steel door, attached to an ice box, to be slammed against the head of the plaintiff, causing him to be permanently injured in his head, neck, arms, brain, body and nerves, all of which caused him great physical pain and mental anguish and to his damage in the reasonable sum of \$30,000.00 (Thirty Thousand Dollars).

V.

That the plaintiff earns as a waiter approximately three hundred and twenty-two dollars per month (\$322.00), and he is informed and believes

*Page numbering appearing at foot of page of original Certified Transcript of Record.

and therefore alleges, that he will be permanently prevented from following his said vocation as a waiter, all to his damage in the reasonable sum of \$25,000.00 (Twenty-five Thousand Dollars).

VI.

Plaintiff has been compelled to employ the services of a physician in and about the cure of his said injuries, all to his damage in the sum of \$1,500.00 (Fifteen Hundred Dollars).

Plaintiff demands the above cause be tried by a jury.

Wherefore, plaintiff prays judgment against the defendant in the reasonable sum of \$66,500.00 (Sixty-six Thousand Five Hundred Dollars) and for costs incurred herein.

/s/ ERWIN P. WERNER,
Attorney for Plaintiff.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1956. [3]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, and in answer to plaintiff's Amended Complaint

on file herein, Admits, Denies and Alleges as follows:

I.

Answering Paragraph IV, this defendant Denies generally and specifically each and every, all and singular, the allegations therein contained and Denies that plaintiff has been damaged to the extent set forth in said paragraph, or at all, or in the sum of \$30,000.00, or in any sum or sums whatsoever, by reason of any carelessness or negligence on the part of this defendant, its agents, servants or employees.

II.

Answering Paragraph V, this defendant does not have sufficient information or belief to enable it to answer the allegations therein contained to the effect that plaintiff earns [5] as a Waiter approximately \$322.00 per month, and for want of such information or belief, defendant Denies said allegation and defendant Denies each and every, all and singular, the remaining allegations set forth in said paragraph and Denies that plaintiff has been damaged in the sum of \$25,000.00, or in any sum, or at all, by reason of any carelessness or negligence on the part of this defendant, its agents, servants or employees.

III.

Answering Paragraph VI, this defendant Denies generally and specifically each and every, all and singular, the allegations therein contained and Denies that plaintiff has been damaged in the sum

of \$1,500.00, or in any sum or sums whatsoever, by reason of any carelessness or negligence on the part of this defendant, its agents, servants or employees.

First Affirmative Defense

As a first, separate and affirmative defense to plaintiff's Amended Complaint on file herein, this defendant Alleges that if plaintiff incurred or sustained any injuries or damages as a result of the matters described in said Complaint, said alleged injuries and/or damages, if any, were solely and proximately caused by the carelessness and negligence of plaintiff in that he failed to exercise ordinary care, or any care, for his own safety and protection at said time and place.

Second Affirmative Defense

As a second, separate and affirmative defense to the Amended Complaint on file herein, this defendant Alleges that if plaintiff incurred or sustained any injuries or damages as a result of the matters described in said Complaint, said alleged injuries and/or damages, if any, were proximately caused and contributed to by the carelessness and negligence of plaintiff in that he failed to exercise ordinary care, or any care, for his own safety and protection at said time and place. [6]

Third Affirmative Defense

As a third, separate and affirmative defense to the Amended Complaint on file herein, this defend-

ant Alleges that if plaintiff incurred or sustained any injuries or damages as a result of the matters described in said Complaint, said alleged injuries and/or damages, if any, were the result of an inevitable and/or unavoidable happening insofar as this defendant, its agents, servants and employees, is or was concerned.

Wherefore, defendant prays that plaintiff take nothing by reason of his Amended Complaint on file herein, and that defendant have and recover its costs and disbursements herein incurred, and for all general and special relief.

ROBERT W. WALKER,
HENRY M. MOFFAT,

By /s/ HENRY M. MOFFAT,
Attorneys for Defendant, The Atchison, Topeka
and Santa Fe Railway Company.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 21, 1956. [7]

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find in favor of the plaintiff, Porter Barrett, and against the defendant, The Atchison, Topeka and Santa Fe

Railroad Company, a Kansas corporation, and fix plaintiff's damages in the sum of \$12,500.

Dated: May 23, 1956.

/s/ CHARLES I. COOPER,
Foreman of the Jury.

[Endorsed]: Filed May 23, 1956. [2*]

United States District Court, Southern District of
California, Central Division

No. 19270-WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

JUDGMENT ON VERDICT

The above-entitled cause was tried before the Court and a duly impanelled jury, on May 22nd, 1956; and oral and documentary testimony was admitted in evidence.

Erwin P. Werner, Esq., appeared as counsel for plaintiff, and Louis M. Welsh, Esq., appeared as counsel for defendant.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

On May 23, 1956, said cause was submitted to the jury, which presented its verdict after deliberation. On order of the Court, the jury was polled and each member thereof stated that the verdict as presented and read was his verdict.

Whereupon, the Court ordered that said verdict be filed and entered as follows: [3]

Now, Therefore, by virtue of the law and by reason of the aforesaid premises,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiff, Porter Barrett, do have and recover of and from the defendant, The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, the sum of Twelve Thousand and Five Hundred Dollars (\$12,500.00), together with costs taxed at \$21.60.

Dated at Los Angeles, California, this 31st day of May, 1956.

/s/ WM. M. BYRNE,

Judge of the District Court.

Receipt of copy acknowledged.

Lodged May 24, 1956.

[Endorsed]: Filed May 31, 1956.

Docketed and entered May 31, 1956. [4]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR RELIEF FROM
JUDGMENT UNDER § 60 (b), FEDERAL
RULES OF CIVIL PROCEDURE

To Plaintiff Porter Barrett and to Erwin P.
Werner, Esq., His Attorney:

You and Each of You Will Please Take Notice
that on Monday, August 13, 1956, at the hour of
10:00 a.m., or as soon thereafter as counsel may be
heard, the defendant, The Atchison, Topeka and
Santa Fe Railway Company, will move the above-
entitled court for relief from the judgment entered
in favor of plaintiff and against defendant on the
31st day of May, 1956, on the grounds and for the
reasons set forth in the motion attached hereto.

Dated this 31st day of July, 1956.

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant. [6]

[Title of District Court and Cause.]

MOTION FOR RELIEF FROM JUDGMENT

Defendant, The Atchison, Topeka and Santa Fe
Railway Company, moves the court to vacate and

to set aside the final judgment entered against defendant in this cause on the 31st day of May, 1956, on the grounds that:

(1) The judgment was obtained by fraud, misrepresentation and other misconduct of the plaintiff, Porter Barrett;

(2) The judgment was obtained by a conspiracy between the plaintiff, Porter Barrett, and Darrington Weaver, M.D., to defraud and misrepresent the plaintiff's physical condition;

(3) The judgment was obtained through the gross exaggeration by plaintiff of his physical disability allegedly caused by the accident;

(4) The judgment was obtained as a result of a conspiracy between the plaintiff, Porter Barrett, and Darrington Weaver, M.D., for the purpose of grossly exaggerating plaintiff's physical [7] disability allegedly caused by the accident;

(5) The judgment was obtained as a result of collusion between the plaintiff, Porter Barrett, and Darrington Weaver, M.D., to defraud and misrepresent for the purpose of obtaining money for both the said plaintiff, Porter Barrett, and the said Darrington Weaver, M.D.

This motion is made and based upon the Affidavits of George Franklin Richcreek, William Perry, Joe Wilson Elliott, John G. Zelezny, Alice Madsen and Louis M. Welsh, all of which are served and filed herewith; upon the reporter's transcript of

proceedings on file herein, the deposition of Porter Barrett on file herein, the motion pictures referred to in the Affidavits of George Franklin Richcreek and Joe Wilson Elliott, which motion pictures will be displayed and exhibited to the court at the hearing; upon certain certified copies of judgments of conviction and sentence of Darrington Weaver, M.D., to be filed herein before the hearing on this motion; upon all other records, papers, pleadings, exhibits and evidence on file herein, the oral testimony introduced at the trial and the physical motions and conduct of plaintiff, Porter Barrett, during the trial, which motions and conduct were observed by the court and all persons present.

Dated this 31st day of July, 1956.

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant. [8]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM PERRY

State of California,
County of Los Angeles—ss.

William Perry, being first duly sworn on oath,
deposes and says:

That he is an investigator licensed and bonded under the laws of the State of California, and that at the request of the defendant, The Atchison, Topeka and Santa Fe Railway Company, he investigated the plaintiff, Mr. Porter Barrett, on May 26, 1956.

At 11:55 a.m. of that day affiant observed Mr. Porter Barrett driving a 1950 light ivory Mercury automobile, license number KLG 190, California, 1956, with white side wall tires. Mr. Barrett was driving alone, and at the time affiant first observed him he was returning to his home at 2929 Van Buren Place in the City of Los Angeles, County of Los Angeles. Mr. Porter Barrett parked his automobile at the front curb, alighted from [21] the automobile with a small package in his hand and entered the above address. Barrett then emerged from his home, returned to the automobile on two separate occasions and each time removed some small item from the automobile and carried it back to the house.

At 12:30 p.m. Mr. Barrett and a young woman came out of the home. They both entered the automobile, Mr. Barrett sitting in the driver's seat. Mr. Barrett then drove the said Mercury automobile to Central Avenue and 67th Street at a normal speed, during which time affiant followed the said Mercury automobile in his automobile and observed the occupants of the said Mercury.

At all times mentioned herein the weather was warm, the day was bright and visibility was excep-

tionally good. Affiant closely observed Mr. Porter Barrett and found that he appeared to be completely normal in all respects. Mr. Barrett's posture was erect and his shoulders were equal, his neck did not twitch and he in no way contorted his head, neck or shoulders.

/s/ WILLIAM PERRY.

Subscribed and sworn to before me this 17th day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State
of California.

My Commission Expires May 9, 1960. [22]

[Title of District Court and Cause.]

AFFIDAVIT OF
GEORGE FRANKLIN RICHCREEK

State of California,
County of Los Angeles—ss.

George Franklin Richcreek, being first duly sworn on oath, deposes and says:

That he is employed by the Stein Investigation Agency, a licensed and bonded investigation agency in the State of California, and that on behalf of that organization he conducted an investigation of

Porter Barrett, plaintiff in the above-entitled action.

On May 28, 1956, at 6:30 a.m. affiant drove his automobile to plaintiff's address at 2929 Van Buren Place, Los Angeles, California, and sat in his automobile surveying said address awaiting the appearance of the plaintiff, Porter Barrett.

At 11:05 affiant observed the plaintiff, Robert Barrett, driving a light gray Mercury Tudor bearing license number KLG 190. [23] Affiant then started his automobile and followed the said Mercury automobile until the latter came to rest in the parking lot of a market in the 1500 block of Jefferson Boulevard. Affiant stopped his automobile and observed plaintiff, Porter Barrett, emerge from the said Mercury and enter the market. At approximately 11:10 a.m. the plaintiff, Porter Barrett, came out of the market, walked to his automobile and drove out of the parking lot to the 300 block on East 33rd Street.

At the time Mr. Porter Barrett emerged from his automobile and entered the market and at the time he returned from the market to his automobile and drove away therefrom, affiant observed that the said plaintiff, Porter Barrett, did not jerk his head, nor was there any twitch, tic or other unnatural movement of his head, neck or shoulders. As the said plaintiff departed from the market, entered his automobile and drove away, affiant took 22 feet of motion pictures of the said Porter Barrett at an

exposure of $f/4$ from an approximate distance of 150 feet with a 16 mm. 220-T Bell and Howell magazine load camera factory locked at 16 frames per second, with a four-inch lens. All subsequent photographs which were taken of the said Porter Barrett were taken with the same camera herein described.

The said Proter Barrett entered a building at 351 East 33rd Street, in which building are the offices of Darrington Weaver, M.D. At 11:25 a.m. affiant took 23 feet of motion pictures of the plaintiff at an exposure of $f/4$ and at an approximate distance of 130 feet. These motion pictures reveal plaintiff Barrett emerging from his automobile, walking up the street, returning to his automobile, again leaving his automobile and entering the doctor's office. During this time affiant observed that plaintiff Barrett did not twitch, jerk or make any other unnatural or abnormal movement of his head, neck or shoulders.

At 12:20 p.m. affiant took 12 feet of motion pictures [24] at an exposure of $f/4$ which show plaintiff Barrett leaving the doctor's office and walking to a lumber supply shop which is in the Mox Wrecking Company at 33rd and Maple Streets. During this time plaintiff Barrett's head and neck were perfectly normally held, and no bobbing or weaving was observed. Plaintiff Barrett departed from the wrecking company and returned to the doctor's office carrying two fluorescent bulbs, and

at this time 12 more feet of motion pictures were taken of this activity.

At 1:05 p.m. affiant took 5 feet of motion pictures of plaintiff Barrett as the latter left the doctor's office and entered his automobile. Said plaintiff drove the automobile for a few blocks, and affiant observed that plaintiff's head suddenly started jerking. Said plaintiff Barrett then drove back to the office of Dr. Darrington Weaver and entered said office. As he entered the office his head was twitching and jerking.

At 2:45 p.m. plaintiff Barrett departed from the doctor's office with an unidentified man, who drove plaintiff Barrett's automobile, plaintiff Barrett then sitting in the passenger side of the front seat. The automobile stopped at the 3000 block on South Maple at a market. The unidentified man who was driving the automobile got out of the car, went into the store and returned to the automobile. The said unidentified person then continued to drive the car and parked it on Bixel Street near 6th Street. Twenty-five feet of motion pictures were taken of plaintiff Barrett walking on Bixel Street to 6th Street, then east on 6th Street, with his head bobbing and twitching. At 3:10 p.m. plaintiff Barrett and the unidentified man entered the Professional Building at 1052 West 6th Street, in which building are located the offices of Morris L. Goren, M.D.

At 4:00 p.m. plaintiff Barrett and the unidentified man departed from the said Professional Building, walked back to 6th Street to the automobile, and the unidentified man drove the [25]

automobile back to Dr. Darrington Weaver's office on 33rd Street. Affiant took 25 feet of motion pictures showing plaintiff Barrett walking from the Professional Building and back toward his automobile.

Affiant ceased surveillance at 5:30 p.m., at which time plaintiff Porter Barrett had not emerged from the office of Dr. Darrington Weaver.

The records of the Department of Motor Vehicles in Sacramento reveal that California license number KLG 190 was issued on January 27, 1956, to Porter Barrett of 2929 Van Buren Place, Los Angeles, California, for attachment to a 1950 Mercury.

/s/ GEORGE FRANKLIN RICHCREEK.

Subscribed and sworn to before me this 16th day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State of
California.

My Commission Expires May 9, 1960. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF JOE WILSON ELLIOTT

State of California,
County of Los Angeles—ss.

Joe Wilson Elliott, being first duly sworn on oath,
deposes and says:

That he is employed by the Stein Investigation Agency, a licensed and bonded investigation agency in the State of California, and that on behalf of that organization he conducted an investigation of Porter Barrett, plaintiff in the above-entitled action.

At 2:20 p.m. on June 25, 1956, affiant drove his automobile to the vicinity of plaintiff Porter Barrett's residence and observed Mr. Barrett's vehicle, namely, a 1950 Mercury Tudor, license number KLG 190, parked in the 3100 block on Van Buren Place. At 2:43 p.m. affiant observed plaintiff Porter Barrett, accompanied by a man and a woman, enter the said Mercury automobile. [27] The plaintiff sat in the driver's seat and drove the automobile away. Affiant followed the said Mercury automobile, and at 3:02 p.m. plaintiff Barrett and his two companions arrived at the Santa Fe Commissary at 2146 East 7th Street, where the male companion got out of the car, appeared to enter the Commissary and later returned to the Mercury automobile. Affiant did not observe plaintiff Porter Barrett leave the automobile. Said plaintiff was wearing a straw cap with a visor, and a short sleeved shirt. His head was perfectly steady, and there was absolutely no abnormal movement noted.

At 3:07 p.m. plaintiff Porter Barrett drove the said Mercury automobile from the Santa Fe Commissary and parked it in the 700 block on South Mateo Street. At this place his male companion departed from the vehicle, and at 3:11 p.m. affiant

took 25 feet of motion pictures of plaintiff at an exposure of $f/4$ and from an approximate distance of 100 feet while the said plaintiff Barrett was sitting in the driver's seat of his automobile. At this time and at all times that affiant observed plaintiff Barrett he appeared to be perfectly normal. These motion pictures and all other motion pictures taken by affiant were taken with a Bell and Howell 200-T magazine load camera factory locked at 16 frames per second, with a three-inch lens. The film used was Eastman Kodak 16 mm. Kodachrome in 50-foot magazines. At 3:15 p.m. the male companion returned to the automobile, and plaintiff Barrett drove the automobile away.

At 3:35 p.m. plaintiff Barrett parked his automobile in a marked parking lot in the 1900 Block on West Adams Boulevard. Barrett entered the market, and upon departure crossed a side street and entered a liquor store. Affiant took 13 feet of motion pictures of Barrett entering and leaving the market, at an exposure of $f/4$ and from an approximate distance of 150 feet.

At 3:45 p.m. affiant took 12 feet of motion pictures of [28] plaintiff Barrett at an exposure of $f/4$ and from an approximate distance of 200 feet while plaintiff Barrett was returning from the liquor store to his parked car. Plaintiff Barrett drove the automobile, with his two companions, to the 3100 block on Van Buren Place, where he arrived at 3:55 p.m. Plaintiff Barrett and his two companions left the automobile, but affiant did not

observe into which of several residences they entered because his vision was obscured by hedges and other foilage. Affiant did not see plaintiff Barrett or his companions subsequently on that date, namely, June 25, 1956.

On June 26, 1956, at 7:00 a.m. affiant took up surveillance in the 3100 block on Van Buren Place, where he observed the 1950 Mercury automobile bearing license number KLG 190. At 8:40 a.m. plaintiff Barrett, accompanied by a man and two women, entered the said Mercury automobile. Affiant observed plaintiff Barrett, and he had no disability and manifested no abnormal physical conditions; in particular, his head, neck and shoulders were normal and did not jerk, weave or bob. Plaintiff Barrett got into the car on the driver's seat and drove the vehicle, containing his three companions, away.

Affiant followed the said Mercury automobile and observed that plaintiff Barrett parked his vehicle behind the Wild Goose Restaurant on Ventura Boulevard and Fulton at 9:10 a.m. One woman departed from the vehicle, and plaintiff Barrett and his two remaining companions departed. Plaintiff Barrett continued to drive the automobile.

Affiant continued to follow the said Mercury automobile, and at 9:15 a.m. plaintiff Barrett parked his car and entered the Thriftmart at Ventura Boulevard and Coldwater Canyon. At 9:25 a.m. affiant took 25 feet of motion pictures at an

exposure of f/4 from an approximate distance of 150 feet as the said Porter Barrett departed from the Thriftmart Store and walked to his [29] automobile and entered it.

Porter Barrett then drove the automobile, and affiant again followed. At 10:05 a.m. Porter Barrett parked his automobile on West 4th Street near June Street, and all occupants remained seated in the automobile. At 10:20 a.m. Porter Barrett drove the automobile away, and at 10:35 a.m. he parked the automobile near a liquor store at Jefferson and Kenwood, emerged from the automobile and entered said liquor store. At 10:40 a.m. affiant took 15 feet of motion pictures of the said Porter Barrett at an exposure of f/4 and from an approximate distance of 150 feet as the said Porter Barrett left the liquor store and walked to his automobile. Barrett then drove the automobile away, and at 10:45 a.m. affiant took 3 feet of motion pictures at an exposure of f/4 and from an approximate distance of 250 feet, of Porter Barrett, showing the said Porter Barrett walking from his automobile to a residence in the 3100 block on Van Buren Place. This residence is a four-unit building numbered from 3108 to 3110½.

At 11:50 a.m. affiant took 4 feet of motion pictures at an exposure of f/4 from an approximate distance of 250 feet of plaintiff Porter Barrett as he returned and entered his automobile accompanied by a man and a woman. Again the plaintiff sat in the driver's seat and drove off. Affiant fol-

lowed the said automobile which plaintiff Porter Barrett was driving, and at 12:00 noon he took 20 feet of motion pictures of said Porter Barrett at an exposure of $f/4$ and from distances varying between 125 feet and 200 feet as the said Porter Barrett walked north on Broadway to Washington Boulevard. Porter Barrett then turned the corner and entered a surplus store.

At 12:10 p.m. affiant took 9 feet of motion pictures at an exposure of $f/4$ and from distances varying between 125 feet and 200 feet, of the said Porter Barrett as he walked south on Broadway and returned to his automobile. [30]

Porter Barrett drove the automobile, and affiant again followed. Barrett parked the said Mercury automobile in a parking lot in the 1000 block on South Main Street, and affiant took 33 feet of motion pictures at an exposure of $f/4$ and from distances varying between 125 feet and 250 feet, of the said Porter Barrett as he walked from the parking lot to the Angelica Uniform Company store at 1101 South Main Street. At 12:35 p.m. affiant took 29 feet of motion pictures at an exposure of $f/4$ and from distances varying between 125 feet and 250 feet, of the said Porter Barrett as he returned to the parking lot and entered his automobile. Affiant did not see the said Porter Barrett subsequently.

At all times affiant observed plaintiff Porter Barrett he was completely normal, his posture was

erect and his shoulders were equal. His neck did not twitch, and he in no way contorted his body, neck or head.

/s/ JOE WILSON ELLIOTT.

Subscribed and sworn to before me this 16th day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State of
California.

My Commission Expires May 9, 1960. [31]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN G. ZELENZY

State of California,
County of Los Angeles—ss.

John G. Zelenzy, being first duly sworn on oath, deposes and says:

That he is an attorney at law licensed to practice in the State of California, and that he is at present associated in the practice of law with Louis M. Welsh, counsel for the defendant in the above-entitled action.

On June 6, 1956, at about 1:00 o'clock p.m., a fairly large, dignified colored gentleman entered our offices in Suite 336, Security Building, 510

South Spring Street, and identified himself as Dr. Darrington Weaver. This gentleman gave affiant a card stating his name to be Darrington Weaver, M. D., which card is attached hereto as Exhibit A and by this reference made a part hereof. [32]

Dr. Weaver asked to see Mr. Welsh, and affiant informed him that Mr. Welsh was not in the office and that his secretary was out to lunch. Thereupon Dr. Weaver told affiant that he was delivering the Satisfaction of Judgment in the above-entitled matter for Mr. Werner, and he left these papers with affiant. The original of said Satisfaction of Judgment which Dr. Weaver delivered is attached to the Affidavit of Louis M. Welch on file herein.

/s/ JOHN G. ZELEZNY.

Subscribed and sworn to before me this 23rd day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State of
California.

My Commission Expires May 9, 1960. [33]

EXHIBIT A

Darrington Weaver, M.D.
351 East Thirty-third Street
Los Angeles 11, Calif.
ADams 3-3295

If No Answer Please Call ADams 2-8084

[Title of District Court and Cause.]

AFFIDAVIT OF ALICE MADSEN

State of California,

County of Los Angeles—ss.

Alice Madsen, being first duly sworn, deposes and says:

I am secretary to Louis M. Welsh, Esq. On the 20th day of June, 1956, I was taking dictation in Mr. Welsh's private office when I heard the door to the outer office open. I went to the outer office and greeted a colored gentleman whose neck was twitching. I asked him if he was Mr. Barrett, and he informed me that he was. I asked Mr. Barrett to be seated for a few minutes until Mr. Welsh could see him. I then went back into Mr. Welsh's private office and did not see Mr. Barrett again.

/s/ ALICE MADSEN.

Subscribed and sworn to before me this 31st day of July, 1956.

[Seal] /s/ TOBIA LEE,
Notary Public in and for Said County and State of
California.

My Commission Expires September 21, [35]
1957.

[Title of District Court and Cause.]

AFFIDAVIT OF LOUIS M. WELSH

State of California,

County of Los Angeles—ss.

Louis M. Welsh, being first duly sworn on oath, deposes and says:

That during the trial of the above-entitled action on May 22, 1956, I noticed a large, portly, dignified colored gentleman about sixty-five years old sitting in the spectators' section of the courtroom watching the trial as it proceeded. This gentleman walked in and out of the courtroom at different times during the first day of trial, and on several occasions he confidentially conferred with plaintiff's counsel, Erwin P. Werner, Esq. On at least two occasions after such a confidential conference, the said colored gentleman would leave the courtroom and later return and report something to Mr. Werner. These activities led me to believe that this gentleman was an investigator for the plaintiff, and I [36] inquired of Mr. Werner during the course of the trial whether or not this gentleman sitting in the spectators' section was an investigator or a witness. Mr. Werner replied that the gentleman was neither, but that he was Dr. Darrington Weaver, plaintiff's physician.

On June 5, 1956, after the judgment was rendered, I forwarded by mail to Mr. Erwin P. Werner the original and two copies of a Satisfaction of

Judgment to be signed by the plaintiff and his counsel. In my letter of transmittal, I informed Mr. Werner that before filing this document, I would present him with a draft from the Santa Fe Railway Company in full payment of the judgment. I was away from my office on June 6, 1956, and when I returned on June 7 I found on my desk the original and two copies of the Satisfaction of Judgment properly signed by Erwin P. Werner and Porter Barrett and acknowledged before a notary public by the name of Wertie Clarice Weaver, whom I am informed is the wife of Dr. Darrington Weaver. The original of said Satisfaction of Judgment is attached hereto marked Exhibit A and by this reference made a part hereof.

Attached to said original and copies of the Satisfaction of Judgment was a note from John G. Zelezny, Esq., an Attorney at Law, who is associated with me in the practice of law, which note read: "These were delivered by Dr. Weaver from Mr. Werner. JZ." The original of this note is also attached hereto marked Exhibit B and by this reference made a part hereof.

Subsequent to the rendition of the verdict and the judgment it was also necessary to obtain the signature of Mr. Porter Barrett on apportionment forms of the Railroad Retirement Board so that the defendant would be authorized to repay the Federal Government for the money that the Government had advanced to the plaintiff, Porter Barrett, under the provisions of the Railroad Retire-

ment Act while Barrett was allegedly incapacitated, out of [37] work and awaiting the trial of this action.

On June 19, 1956, I mailed three copies of said apportionment forms to Erwin P. Werner, Esq., and requested that Mr. Porter Barrett execute them and return them to me for transmittal to the defendant railway company.

The following morning (June 20, 1956) I was away from my office, and when I returned at about 11:45 a.m. there was a telephone message on my desk informing me that a Mr. Weaver had telephoned and that I should return his call at ADams 3-3295. This telephone number is the same number which is listed for Darrington Weaver, M.D., and which telephone number also appears on the business card of Darrington Weaver, M. D., which is attached as Exhibit A to the Affidavit of John G. Zelezny on file herein. Before I was able to return this telephone call I received a call from a gentleman who identified himself as Dr. Darrington Weaver and who asked me how soon the Santa Fe could deliver its draft in payment of the judgment in favor of Mr. Barrett. I informed Dr. Weaver that I would first have to receive the apportionment forms which I had mailed to Mr. Werner the previous day, and that those apportionment forms would then be sent to the Santa Fe, the draft would be ordered from Chicago and that within a week it could be delivered. Dr. Weaver told me that he would appreciate our expediting the matter, and I

told him that we would not delay. Dr. Weaver then asked me if I expected to be in my office the afternoon of that date, namely, June 20, 1956, and I said that I did. Dr. Weaver said that Mr. Barrett would personally deliver the apportionment forms that afternoon, and I thanked him. That was the end of the telephone conversation.

That afternoon, namely, June 20, 1956, Mr. Porter Barrett came to my office at Suite 336, Security Building, 510 South Spring Street, Los Angeles 13, California, for the purpose of delivering three copies of Railroad Retirement Board Apportionment forms. I [38] was in my private office when Mr. Barrett entered the outer office, and did not see him for about five or ten minutes after he had entered our suite.

I then walked to the outer office, greeted Mr. Barrett by shaking his hand and received the apportionment forms from him. Mr. Barrett and I conversed, and during this conversation Mr. Barrett asked me to get the check as soon as possible, because he needed the money very badly. He stated that he would end up with very little money out of the judgment, and that when he got through paying everyone off he would have only \$800.00 or \$900.00 left, because he had to make large payments to other people.

I observed Mr. Barrett jerking his neck in rapid, frequent jerks of about one per second or one per second and a half, in the same manner as he jerked

his neck during the trial of the above-entitled matter. In addition, Mr. Barrett's left shoulder was lower than his right shoulder, and his stance and walk caused him to list to the left. He grimaced almost constantly and gave every indication of experiencing great pain. Occasionally he would strike his head with his hand in what appeared to be a futile attempt to relieve the pain and jerking. I talked with Barrett for about five or six minutes, and at no time during my conversation with Mr. Barrett did he cease from these jerkings and contortions.

Barrett then left my office, and I opened the door of my office, stepped into the hall and looked toward the elevators of our building, where I could observe Barrett from behind and from the side, although he did not observe me. I saw Barrett waiting for the elevators, and when the elevator arrived I saw him step onto the elevator. During my observation of Barrett in the hallway, Barrett stood perfectly normally, his posture was erect and his shoulders were equal, his neck did not twitch and he in no way contorted his body, neck or head. This was the first time that I [39] had seen Mr. Barrett when he was not aware that I was observing him, and this was the first time that I had seen Mr. Barrett when he was not jerking, contorting and twitching his neck or body.

The Affidavits of William Perry and George Franklin Richcreek disclose that while Mr. Barrett was under surveillance from May 26, 1956, to May

28, 1956, he displayed no jerking, twitching or other abnormality; that on May 28, 1956, at 1:05 p.m. plaintiff Barrett began to twitch and jerk while he was en route to Dr. Morris Goren's office. When this information was first communicated to me, I instructed the investigators to cease their surveillance until after the time had expired within which a motion for new trial could be made. I had concluded that this sudden jerking was the result of one of three causes, namely:

(1) It was caused by an affliction beyond the plaintiff's control, and was thus genuine; (2) it was the result of a voluntary act on the part of the plaintiff, done for the purpose of misleading Dr. Morris Goren; or (3) the plaintiff had observed that he was under surveillance and he voluntarily began to twitch in order to mislead those who were observing him.

Later, on July 2, 1956, during a conversation with Erwin P. Werner, Esq., plaintiff's counsel, I learned from Mr. Werner that plaintiff Barrett had obtained knowledge of the fact that he was under observation and that someone was taking motion pictures of him.

The Affidavit of Joe Wilson Elliott and the motion pictures which will be shown to the court disclose that plaintiff had no recurrence of the jerking attack while he was being observed after the ten-day period for the motion for new trial had expired.

/s/ LOUIS M. WELSH.

Subscribed and sworn to before me this 31st day of July, 1956.

[Seal] /s/ ALICE MADSEN,
Notary Public in and for Said County and State of
California.

My Commission Expires May 9, 1960. [40]

[Title of District Court and Cause.]

EXHIBIT A

SATISFACTION OF JUDGMENT

The judgment herein having been paid, full satisfaction is hereby acknowledged of said judgment docketed and entered on the 31st day of May, 1956, in favor of plaintiff and against defendant above named, and the clerk is hereby authorized and directed to enter full satisfaction of record in said action.

Dated this 6th day of June, 1956.

/s/ ERWIN P. WERNER,
Attorney for Plaintiff,

/s/ PORTER BARRETT,
Plaintiff.

State of California,
County of Los Angeles—ss.

On this 6th day of June, 1956, before me, Wertie Clarice Weaver, a notary public in and for said

County and State residing therein, duly commissioned and sworn, personally appeared Erwin P. Werner and Porter Barrett, known to me to be the same persons whose names are subscribed to the within instrument, and they duly acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public in and for Said
County and State. [42]

EXHIBIT B

[Memo Pad]

Santa Fe

Swift, Sure Freight and Passenger Service Is a
Santa Fe Tradition

6/6/56.

These were delivered by Dr. Weaver from Mr.
Werner.

/s/ J. Z.

Receipt of copy acknowledged.

[Endorsed]: Filed August 2, 1956. [43]

[Title of District Court and Cause.]

AFFIDAVITS FILED BY PLAINTIFF IN OP-
POSITION TO DEFENDANT'S MOTION
FOR RELIEF FROM JUDGMENT

[Title of District Court and Cause.]

AFFIDAVIT OF ARNOLD G. ROBERTS

State of California,
County of Los Angeles—ss.

Arnold G. Roberts is my name. I am an American. I live at 1428 East 45th Street, Los Angeles, California. I have been steadily employed by the Atchison, Topeka and Santa Fe Railway Company in the capacity of dining car cook for about eleven (11) years.

I have known and worked with Porter Barrett for years just prior to the date of his March 11, 1955, accident and have had frequent contact with him following the aforementioned date of accident.

Several months after the accident heretofore mentioned, I noticed Porter Barrett jerking his head at intervals during our conversations and the same observations are evidenced up to the present time.

/s/ ARNOLD G. ROBERTS. [53]

State of California,
County of Los Angeles—ss.

On this third day of July, 1956, before me, Wertie Clarice Weaver, a Notary Public in and for the County of Los Angeles and State of California, duly commissioned and residing therein, personally appeared Arnold G. Roberts, known to me to be the person whose name is affixed to the foregoing statement and he acknowledged to me that he executed the same of his own free will and voluntary act.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [54]

[Title of District Court and Cause.]

AFFIDAVIT OF LEMAUD J. NASH

State of California,
County of Los Angeles—ss.

Lemaud J. Nash is my name. I am an American. I live at 9230 Hooper Avenue, Los Angeles, California. I have been steadily employed by the Atchison, Topeka and Santa Fe Railway Company in the capacity of dining car waiter for about twenty-one (21) years.

I have known and worked with Porter Barrett for years just prior to the date of his March 11, 1955, accident and have had frequent contact with him following the aforementioned date of accident.

Several months after the accident heretofore mentioned, I noticed Porter Barrett jerking his head at intervals during our conversations and the same observations are evidenced up to the present time.

/s/ LEMAUD J. NASH. [55]

State of California,
County of Los Angeles—ss.

On this third day of July, 1956, before me, Wertie Clarice Weaver, a Notary Public in and for the County of Los Angeles and State of California, duly commissioned and residing therein, personally appeared Lemaud J. Nash, known to me to be the person whose name is affixed to the foregoing statement and he acknowledged to me that he executed the same of his own free will and voluntary act.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [56]

[Title of District Court and Cause.]

AFFIDAVIT OF RHODES ROBINSON

State of California,
County of Los Angeles—ss.

I, Rhodes Robinson, being first duly sworn depose and say that I have been a cook for the dining car department of the Santa Fe Railway Company for more than ten years and have been associated with Porter Barrett for that length of time; that Porter Barrett and I live in the same neighborhood; that I saw him often before his accident of March 11, 1955, and since that date; that I see Mr. Barrett now about fifteen days every month and during the past several months I have observed him intermittently jerking his head.

/s/ RHODES ROBINSON.

Subscribed and sworn to before me a Notary Public in and for the County of Los Angeles and State of California, this 2nd day of July, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [57]

[Title of District Court and Cause.]

AFFIDAVIT OF WALTER BOZEMAN

State of California,
County of Los Angeles—ss.

Walter Bozeman is my name. I am an American. I live at 11251½ East 65th Street, Los Angeles, California. I have been steadily employed by the Atchison, Topeka and Santa Fe Railway Company in the capacity of dining car cook for about thirteen (13) years.

I have known and worked with Porter Barrett for years just prior to the date of his March 11, 1955, accident and have had frequent contact with him following the aforementioned date of accident.

Several months after the accident heretofore mentioned I noticed Porter Barrett jerking his head at intervals during our conversations and the same observations are evidenced up to the present time.

/s/ WALTER BOZEMAN. [58]

State of California,
County of Los Angeles—ss.

On this ninth day of July, 1956, before me, Wertie Clarice Weaver, a Notary Public in and for the County of Los Angeles and State of California, duly commissioned and residing therein, personally appeared Walter Bozeman, known to me to be the

person whose name is affixed to the foregoing statement and he acknowledged to me that he executed the same of his own free will and voluntary act.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [59]

[Title of District Court and Cause.]

AFFIDAVIT OF JESSE MITCHELL

State of California,
County of Los Angeles—ss.

Jesse Mitchell, being first duly sworn deposes and says that he is now and has been for many years an employee for the Atchison, Topeka and Santa Fe Railway Company; that during the past years he has worked with Porter Barrett and has had occasion to observe him closely; that subsequent to the date of his accident, March 11, 1955, he has noticed that Porter Barrett jerks his head on several occasions during the day; that at times the head jerking is more pronounced than at other times; that he first noticed this condition in Mr. Barrett about a year ago; that he was subpoenaed by the plaintiff Barrett to testify in his action in the Fed-

eral Court against the Atchison, Topeka and Santa Fe Railway, but failed to do so upon advice of Santa Fe representative on the grounds that he was not legally served.

/s/ JESSE M. MITCHELL. [60]

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles and State of California, this 2nd day of July, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [61]

[Title of District Court and Cause.]

AFFIDAVIT OF RICHARD GOLDSMITH

State of California,
County of Los Angeles—ss.

Richard Goldsmith, being first duly sworn deposes and says that he is now and has been a waiter continuously for the Atchison, Topeka and Santa Fe Railway Company for more than eleven years; that during the last five years of that time he has worked with Porter Barrett and has had occasion to observe him closely; that subsequent to the date of his accident, March 11, 1955, he has noticed that Porter Barrett jerks his head on several occasions during the day; that at times the head jerking is more pro-

nounced than at other times; that he first noticed this condition in Mr. Barrett about a year ago; that he was subpoenaed by the Plaintiff Barrett to testify in his action in the Federal Court against the Atchison, Topeka and Santa Fe Railway, but failed to so testify upon advice of Santa Fe representative on the grounds that he was not legally served.

/s/ RICHARD GOLDSMITH. [62]

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles and State of California, this 2nd day of July, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [63]

[Title of District Court and Cause.]

AFFIDAVIT OF CALVIN DAVIS

State of California,
County of Los Angeles—ss.

Calvin Davis, being first duly sworn deposes and says that he is now and has been an employee for the Atchison, Topeka and Santa Fe Railway Company for many years; that during the past years he has worked with Porter Barrett and has had occasion to observe him closely; that subsequent to the date of his accident, March 11, 1955, he has noticed

that Porter Barrett jerks his head on several occasions during the day; that at times the head jerking is more pronounced than at other times; that he first noticed this condition in Mr. Barrett about a year ago; that he was subpoenaed by the Plaintiff Barrett to testify in his action in the Federal Court against the Atchison, Topeka and Santa Fe Railway, but failed to so testify upon advice of Santa Fe representative on the grounds that he was not legally served.

/s/ CALVIN DAVIS, JR.

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles and State of California, this 2nd day of July, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [64]

[Title of District Court and Cause.]

AFFIDAVIT OF
DARRINGTON WEAVER, M.D.

State of California,
County of Los Angeles—ss.

Darrington Weaver, M.D., being first duly sworn deposes and says: that he is licensed by the State of California to practice medicine and surgery; that

prior to and subsequent to December 17, 1955, he was so licensed; that on the aforesaid date at the hour of 7:30 p.m. he consulted with, made an examination of and administered treatment to Porter Barrett; that prior to aforesaid date and time affiant had never met, had never seen and had never heard of Porter Barrett; that subsequent to December 17, 1955, affiant referred Porter Barrett to Morris L. Goren, M.D., for examination and treatment; that on the 24th day of December, 1955, the following letter was written to the Atchison, Topeka and Santa Fe Railway Company, Dining Car Department, 2014 South Wentworth Avenue, Chicago 16, Illinois.

“To Whom This May Concern: This is to certify that Mr. Porter Barrett of 2929 Van Buren Place, Los Angeles, California, has been and is now under my care for an injury to his head; and that his physical condition is of such nature and extent as to incapacitate him for the performance of his usual duties. Dated this [65] 24th day of December, 1955. Darrington Weaver, M.D.”

That on January 7, 1956, in response to the aforesaid letter, affiant received an answer by mail from the Dining Car Department of the Atchison, Topeka and Santa Fe Railway Company, requesting in substance the diagnosis arrived at; that following the receipt of the aforementioned letter affiant received another letter from the Dining Car Department of the Atchison, Topeka and Santa Fe Railway Company dated January 25, 1956; that on

January 30, 1956, affiant mailed the following letter to the Dining Car Department of the Atchison, Topeka and Santa Fe Railway Company:

“January 30, 1956.

The Atchison, Topeka and Santa Fe Railway
Company,

Dining Car Department,
2014 South Wentworth Avenue,
Chicago 16, Illinois,

Attention: Mr. W. H. Ford.

Re: Porter Barrett.

Gentlemen:

Replying to your communications of recent date relative to the above-captioned patient, I herein state that Mr. Barrett is incapacitated for the performance of his usual duties because of the following:

- (1) Traumatic torticollis.
- (2) General neurosis and psychosis,
due to trauma.
- (3) General Debility.

This patient has been examined also by other specialists who have corroborated the above diagnosis and treated him for the same conditions. I shall find pleasure in furnishing you with the names and addresses of these physicians upon receipt of permis-

sion from Mr. Barrett. The disability is both total and permanent.

Respectfully yours,

DARRINGTON WEAVER,
M.D."

DW:pvw.

"That several days following the rendition of the judgment, Mr. Erwin P. Werner (being engaged in trial) requested affiant to deliver to Mr. Louis Welch certain [66] release papers; that affiant carried the papers to the office of Mr. Louis Welch and after being told by a gentleman in Mr. Welch's office that Mr. Welch was not there and would not return during the day, affiant left the papers with the gentleman with a request that the papers be given to Mr. Welch; that affiant, at the time aforementioned, identified himself and presented the gentleman with affiant's professional card and told the gentleman to say to Mr. Welch that Mr. Werner was engaged in trial; that affiant has never inquired of Mr. Welch, nor anyone in or out of Mr. Welch's office at any time anything about a check; that affiant has never in his lifetime spoken to Mr. Louis Welch a word, either on the telephone or in any other manner about anything; that affiant was present during a brief period of the trial and was ready to testify if called upon and that during that time affiant made a telephone call to his office; that affiant was granted a full and unconditional pardon from the Governor of California on December 23,

1953, for the offenses on which affiant was convicted as stated in defendant's brief and affidavit; that affiant did not conspire with Porter Barrett at any time to exaggerate his injuries nor to defraud the defendant.

[Seal] /s/ DARRINGTON WEAVER, M.D.

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles, and State of California, this 6th day of August, 1956.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960. [67]

[Title of District Court and Cause.]

AFFIDAVIT OF PORTER BARRETT,
PLAINTIFF

State of California,
County of Los Angeles—ss.

Porter Barrett, being first sworn deposes and says: that he is the plaintiff in the above-matter and that he has read the brief and affidavits filed by the defendant; that on the 17th day of December, 1955, he went to Dr. Weaver's office for consultation and treatment; that prior to the aforementioned date he had never met nor had ever seen Dr. Weaver before; that soon thereafter, on the recommendation of Dr. Weaver, he went to Dr. Goren for

examination and treatment, all of which has been testified to; that since the trial he has continued his treatment with Dr. Goren and is now receiving weekly treatments from him; that affiant still suffers from the torticollis, but not as severe since the trial; that these attacks come on principally when he is excited or nervous; that during the trial he testified that he was seldom free from it; that by this, he meant that at times varying from one to four hours, he did not jerk; that during times of stress, such as the trial, taking of deposition, seeing doctors or lawyers the jerking is worse; that he has no control over the condition; that he further affirms that at no time has Dr. Weaver advised him what to do; that he still further affirms that at no time has he conspired with Dr. Weaver to exaggerate his injuries; that on [68] the 10th day of April, 1956, the affiant was examined by Dr. John B. Doyle, at Room 601, 1930 Wilshire Boulevard, Los Angeles, California, at the request of the defendant.

/s/ PORTER BARRETT.

Subscribed and sworn to before me, a Notary Public in and for the County of Los Angeles and State of California, this 4th day of August, 1956.

/s/ WERTIE CLARICE WEAVER,
Notary Public.

My Commission Expires May 4, 1960.

Receipt of copy acknowledged.

[Endorsed]: Filed August 24, 1956. [69]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN B. DOYLE, M.D

State of California,
County of Los Angeles—ss.

John B. Doyle, M.D., being first duly sworn on oath, deposes and says:

That he is a physician and surgeon licensed to practice medicine in the state of California and specializing in the field of neurology and psychiatry. That on the 10th day of April, 1956, affiant examined Mr. Porter Barrett at the request of Henry M. Moffat, counsel for The Atchison, Topeka and Santa Fe Railway Company, and on April 10, 1956, affiant sent to the said Mr. Moffat a report of his examination, findings and conclusions, a copy of which is attached hereto and made a part hereof.

That Mr. Porter Barrett said to affiant during affiant's examination of Mr. Barrett that he is "never without it [the twitching] unless I'm asleep and don't know about it." Mr. Barrett [71] stated further that he knew of nothing that diminished the tendency to the twitching.

/s/ JOHN B. DOYLE, M.D.

Subscribed and sworn to before me this 7th day of September, 1956.

[Seal] /s/ HAL C. KERN, JR.,
Notary Public in and for the Said County and State
of California.

My Commission Expires Dec. 16, 1956. [72]

John B. Doyle, M.D.
1930 Wilshire Boulevard
Los Angeles 57, California

April 10, 1956.

The Atchison, Topeka and Santa Fe Railway Company,
448 Santa Fe Building,
Los Angeles 14, California.

Attention: Henry M. Moffat, Attorney.

Dear Mr. Moffat:

Re: Barrett, Mr. Porter.

The following are my findings in the case of Mr. Porter Barrett, of 2929 Van Buren Place, Los Angeles 7, California, a forty-three year old married man, whom I examined at the office.

Informant:

The patient.

Family History:

The father sixty-eight is living and well. The patient says he does not remember his mother who died as a "very young woman" from unknown causes. Two brothers, forty-eight and thirty-five and three sisters, forty-five, fifty-two and thirty are living and well. There is no other history of familial or nervous or mental disease.

Marital History:

The patient was married at twenty-one or twenty-two years of age. If alive, the first wife is about

forty. At the end of four and a half or five years he and his first wife separated. One son twenty-one or twenty-two is living and well. About thirty-two years of age the patient married a second time. At the end of three years the patient and his wife separated, if alive she is thirty-eight or forty years of age. By another woman the patient has a daughter seven who is living and well.

Previous Diseases and Injuries:

To the best of the patient's knowledge [73] he did not have the usual diseases of childhood. At forty-one he developed mumps on the right side complicated by left orchitis without subsequent atrophy.

About forty-one years of age while working on his automobile a wrench slipped and the patient suffered a laceration of the ulnar aspect of the right hand which required suturing. He lost no time from work due to that injury. He has had no other significant injuries, was born with no deformities.

Former Operations:

Tonsillectomy at twenty-four. Appendectomy for chronic appendicitis at thirty. Suturing of a laceration of the ulnar aspect of the right hand about forty-one years of age.

Habits:

Until five or six years ago the patient drank not to exceed two cups of coffee daily and one cup of tea with lunch. He drinks one quart of milk daily. His appetite has been O.K. He eats two meals a day as a

rule. The bowels move regularly once a day. He sleeps well from 11 or 12 p.m. until about seven o'clock the following morning. Occasionally he takes a nap. He has not suffered from nocturia. He smokes about three-quarters of a pack (15) cigarettes daily. He uses tobacco in no other form. On a week end probably he may "take quite a few" drinks of alcoholic beverage. On some occasions he has been "a little high." He takes no medication regularly.

Previous Residences:

The patient was born January 18, 1912, in Louisiana. For thirty years he has resided in California.

General Historical Survey:

The patient is the third of a family of six. Was rather large for his years during boyhood. He believes he enjoyed average nourishment. Between eighteen and twenty-one he believes that his weight was 130 pounds (undressed). For the past ten years his weight has been approximately 185 pounds (undressed). He is not sure whether his weight has changed during the past year because he has "not weighed."

By fourteen or fifteen he had completed the work of the eighth grade. He was very athletic, played baseball and basketball. He continued to play baseball until twenty-two or twenty-three years of age. Subsequently he took "regular exercise" at the Y.M.C.A. until about the time he gave up playing baseball. Later he enjoyed swimming in the ocean, horseback riding, etc.

Until about five years ago the patient states that he enjoyed very substantial energy and endurance. Since then he has "not been as good" as before. As a rule he has been cheerful [74] and not inclined to worry. He has not been subject to wide swings of mood. He believes that he has been rather sociable. He believes that he has always been able to see "the jolly side of life."

As a small boy the patient lived on a farm. The patient was told that he left the farm while he was "very young." After leaving school the patient was employed at shoe shining. At about twenty-two years of age the patient began working as a waiter. He continues to do that type of work. About fourteen years ago the patient was employed by the dining car service on the Union Pacific Railway. Some four years later he transferred to the Santa Fe. He last worked on December 17, 1955. He last worked on the Super Chief.

About 8:30 or 8:45 p.m., March 11, 1955, while serving dinner on the Super Chief when the patient went into the pantry to get something out of the "chill-box." While stooping another waiter slammed another door of the "chill-box" so that it struck the patient on the top of the head at the vertex. As a result of the blow the patient states that the scalp was lacerated and bled freely. For a few moments the patient states he was "dazed" while he sat on the pantry floor. Ice was applied to the scalp. Later the wound was dressed. Suturing was not required. The patient is not certain whether he did any more work that night. He says "I would say I probably did."

The following day he states his head was "sore" in the region of the vertex. The patient states that the accident took place on the first night of Chicago. He continued to work "all the way into" Los Angeles. At that time he states that his head was not bothering him. As a result he did nothing about it. The patient went out on the Super Chief, on the second evening he states that he had "a few pains in the head" but got along "O.K."

About ten days or two weeks later a scab about the size of a silver dollar was forming on the scalp at the vertex. When he returned to Los Angeles after the appearance of the "scab" he consulted a physician who recommended that the patient be admitted to a hospital to "get bad blood out" of the site of injury. The patient accordingly visited the Santa Fe Hospital, Los Angeles, where nothing was done. The patient was told to consult a physician employed by the Santa Fe on his next trip to Chicago. Accordingly on arrival in Chicago the patient secured an authorization and consulted a physician who advised that the patient be admitted to the Santa Fe Hospital at Topeka, Kansas. An official on the railway in the Commissary in Chicago "denied me this opportunity," the patient says. The patient was referred to another "company doctor in Chicago" who examined him. The commissary also sent the patient to an oculist and a "E.N.T." specialist. The patient was given to understand that everything was "fine," by the "eye doctor." The E.N.T. doctor treated the patient six or eight times during the ensuing six

atrophy, inco-ordination, tremor, fibrillation, diminished acuity of vision or hearing, diplopia, ptosis, tinnitus, O.M.S., disturbance of speech or swallowing or control of the spincters. The patient states he feels fine except in his head, neck and right upper limb. At this time he states that his headache is bothering him "very much." The musculature of the neck is said to be "going like that" (indicating flexion and extension of the fingers of the left hand). The right upper limb is said to be feeling "numb."

Examination:

The patient is a well-developed, well-nourished, middle-aged negro, who at irregular but rather frequent intervals rapidly turns his head to the right and shakes it vigorously. At times he shakes the head without rotating it to the right. On other occasions he blinks his eyelids. He is 68 inches tall, weighs 184½ pounds and manifested blood pressure of 152/108 and a pulse rate of 96 and a temperature of 99.0°F, at 4:50 p.m. Considerable dental restorative work is seen. The tonsils have been removed. There is a short oblique postoperative scar over the right lower quadrant of the abdomen. The spine is straight, shows normal cervical and lumbar lordotic curves in profile view. Stooping with the knees extended the fingertips touch the floor. There is a moderate degree of genu varum. The hands and feet are slightly to moderately moist and cool. There is normal pulsation of both radial, posterior tibial and dorsalis pedis arteries. In other respects the general physical examination including the examinations of

the scalp, skin, buccal and pharyngeal cavities, superficial glands, thyroid, breasts, peripheral arteries, heart, lungs, abdomen, liver, kidney, spleen, inguinal and femoral rings, genitalia, rectum, spine, joints and extremities, is essentially negative.

Neurologic Examination:

The sensation of smell is normal bilaterally. The pupils which are about 3 mm. in diameter are equal and regular and respond promptly to light and in-convergence. The ocular movements are normal; there is no ptosis or nystagmus. To rough tests the visual fields are tubular in outline. The epthalmoscopic examination (in the dark room) is negative.

The patient reads Je.0.75 O.S. and 1.25 O.D. at somewhat extended distance. The watch-tick (usually heard at twenty inches) is heard at six inches with the right ear and at twelve with the left. Air conduction is superior to bone conduction bilaterally. Weber is not referred. Speech is normal.

The patient gags to a very marked degree. Power, tone and speed of the muscles innervated by the remaining cranial nerves and the musculature of the limbs and trunk are normal. Vibratory sensation which is normally perceived over the sternum and the metacarpal bones is slightly diminished over the iliac crests and the malleoli. Sensations of touch, pain, warm, cold, position, passive movement, sterognosis and pressure are normally perceived throughout. The finger-to-nose test is well executed [77] bilaterally, in a rather bizarre manner. The heel-to-

knee tests are well executed on the two sides. There is no tremor, adiadochokinesia, or cervical rigidity. Kernig's and Lasegue's signs are absent.

The corneal reflexes are normal. I am unable to test the pharyngeal reflexes satisfactorily owing the patient's gagging tendencies and grimaces and movements of the head. The sucking and the hard palate reflexes and the jaw-jerk and the palm-chin sign are not obtained. The biceps, triceps and supinator reflexes are normal and equal on the two sides. Hoffmann's sign is absent. The patellar reflexes are slightly diminished. The achilles reflexes are moderately markedly diminished. There is no ankle clonus. The abdominal and cremasteric reflexes are normal. On plantar stimulation the response is flexor in character bilaterally. Chaddock's and allied signs are not obtained.

The gait is normal; the patient walks heel-to-toe satisfactorily, swings his arms freely as he walks. Romberg's sign is absent; there is no truncal ataxia. The station on each foot separately is satisfactory. There are no palpable abnormalities of the ulnar, radial or peroneal nerves nor of the scalp, skull or spine. There is no tenderness on percussion over the head or spine.

Throughout the examination the patient is alert, pleasant, attentive and co-operative but very tense, anxious, hypochondriacal and demonstrative. His speech is coherent and relevant. His sensorium is clear and his memory is good. He has limited insight.

Impression:

The general physical examination reveals a mild hypertensive reaction and slight elevation of the pulse rate and temperature in a well-developed, well-nourished, negro who frequently turns his head rapidly to the right and shakes it, or shakes it without rotating it to the right, blinks and grimaces. The ophthalmoscopic examination is negative. The neurologic examination discloses tubular visual fields which are due to mental rather than physical causes. In other respects the examination is objectively negative. No hypertrophy of the sternocleidomastoid or trapezius muscles is seen.

From these data it would appear that as a result of the accident of February 11, 1955, the patient sustained a contusion of the scalp without losing consciousness. The evolution of his symptoms was gradual and unquestionably was aggravated by resentment toward an official in the Commissary Department of the Railway of Chicago. The clinical picture is not that of spasmodic torticollis but rather of habit spasms. In my opinion Mr. Barrett's symptoms are due entirely to mental causes. In this case settlement of litigation may be expected to be followed by his prompt recovery.

Respectfully submitted,

JOHN B. DOYLE, M.D.

JBD/mbf.

[Endorsed]: Filed September 10, 1956. [78]

In the Superior Court of the State of California
in and for the County of Angeles

No. 84904

THE PEOPLE OF THE STATE OF CALI-
FORNIA

vs.

DARRINGTON WEAVER.

Present: Hon. Thomas L. Ambrose, Judge.

JUDGMENT

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 20 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 21 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 22 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of California, a felony, as charged in Count 23 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this court of the crime of

Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 24 of the information and defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Subornation of Perjury, a felony, as charged in Count 25 of the information and Defendant having admitted prior conviction of a felony as alleged in the information, to wit: Violation of State Poison Act, a felony, convicted in the Superior Court of the State of California, Los Angeles County, upon which judgment was rendered on or about February 13, 1931, and having admitted that he served a term of imprisonment therefor in the State Prison.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison for the term prescribed by law.

It Is Further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Warden of the State Prison of the State of California at San Quentin.

Done in Open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Perjury, a felony, as charged in Count 26 of the information and Defendant having admitted prior conviction of a felony as alleged in the information, to wit: Violation of State Poison Act, a felony, convicted in the Superior Court of the State of California, Los Angeles County, upon which judgment was rendered on or about February 13, 1931, and having admitted that he served a term of imprisonment therefor in the State Prison.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison for the term prescribed by law, which sentence is ordered to run Concurrently with sentence in Case No. 84904, Count 25.

It Is Further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Warden of the State Prison of the State of California at San Quention.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 28 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Forgery of Fictitious Name, a felony, as charged in Count 29 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the County Jail of the County of Los Angeles for the term of one year, which sentence is ordered to run Concurrently with State Prison sentences in Case No. 84904, Counts 25 and 26.

It is Further Ordered that the defendant be remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 7th day of April, 1942.

No. 84905

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 1 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 2 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 3 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count

4 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 5 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 6 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

Whereas the said Darrington Weaver, having been duly found guilty in this Court of the crime of

Violation Section 556 of the Insurance Code of the State of California, a felony, as charged in Count 7 of the information and Defendant having admitted prior conviction as alleged therein.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver pay a fine of One Hundred Dollars.

Done in open Court this 7th day of April, 1942.

No. 42406

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 1 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law.

The defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 2 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of

California at San Quentin for the term prescribed by law. To run consecutively with sentence in Case No. 42406, Count 1.

The Defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

No. 42407

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 1 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law.

The defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 2 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed

by law. To run Consecutively with sentence in Case No. 42407, Count 1.

The Defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

Whereas the said Darrington Weaver having been duly found guilty in this Court of the crime of Violation of State Poison Act, a felony, as charged in Count 3 of the information.

It Is Therefore Ordered, Adjudged and Decreed, that the said Darrington Weaver be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law. To run consecutively with sentences in Case No. 42407, Counts 1 and 2.

The defendant was then remanded to the custody of the Sheriff of the County of Los Angeles.

Done in open Court this 6th day of February, 1931.

Certified true copies.

[Endorsed]: Filed as of August 16, 1956; February 4, 1957; U.S.D.C.

[Title of District Court and Cause.]

ORDER ON DEFENDANT'S MOTION UNDER
60(b) FEDERAL RULES OF CIVIL PRO-
CEDURE

The defendants' motion to set aside the judgment in favor of plaintiff under 60(b) Federal Rules of

Civil Procedure came on for hearing this 10th day of September, 1956, before the Honorable Wm. F. Byrne, the plaintiff Porter Barrett appearing by his counsel, Erwin P. Werner, the defendant Atchison, Topeka and Santa Fe Railway Company, appearing by its counsel, Louis M. Welsh; the Court being fully advised in the premises and good cause appearing therefor,

It Is Hereby Ordered that the defendant's motion be, and the same is hereby denied.

Dated this 17th day of September, 1956.

/s/ WM. F. BYRNE,

Judge of United States
District Court.

Receipt of copy acknowledged.

Lodged September 11, 1956.

[Endorsed]: Filed September 18, 1956.

Docketed and entered September 18, 1956. [82]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, defendant above named, appeals to the United States Court of Appeals for the Ninth Circuit, from the order denying motion to set aside judgment and motion for relief from judgment, entered in this action on the 18th day of September, 1956.

Dated this 20th day of September, 1956.

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant.

[Endorsed]: Filed September 20, 1956. [84]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

The points upon which appellant intends to rely on this appeal are as follows:

1. The honorable trial court erred in failing to find as a matter of fact and law that the judgment in this case was obtained by plaintiff's fraud, misrepresentation and other misconduct.

2. The honorable trial court erred in failing to find as a matter of fact and law that the judgment in this case was obtained by other reasons justifying relief from the operation of the judgment.

3. The honorable trial court erred in denying defendant's motion for relief from the judgment upon the grounds stated in said motion.

4. The honorable trial court erred in that it applied the criteria for determining a motion for a new trial rather than [89] the criteria established for determining a motion for relief from judgment under Rule 60(b) Federal Rules of Civil Procedure.

Dated this 27th day of September, 1956.

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

By /s/ LOUIS M. WELSH,
Attorneys for Defendant.

[Endorsed]: Filed September 28, 1956. [90]

United States District Court, Southern District
of California, Central Division

No. 19270—WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

Honorable William M. Byrne, Judge Presiding, and
a Jury.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, May 22, 1956

Appearances:

Attorney for Plaintiff:
ERWIN P. WERNER.

Attorneys for Defendant:

ROBERT W. WALKER,
HENRY M. MOFFAT,
LOUIS M. WELSH,

* * *

Mr. Werner: Your Honor, I have a Doctor here who I wish to call out of order. He has engagements in the afternoon and he isn't available in the proper sequence.

The Court: You may.

Mr. Werner: Thank you, your Honor.

MORRIS L. GOREN, M.D.

called as a witness herein on behalf of the plaintiff,
being first duly sworn, testified as follows:

The Clerk: Give us your full name, please.

A. Morris L. Goren, M.D.

Direct Examination

By Mr. Werner:

Q. Doctor Goren, will you state your qualifications to the court and to the jury, please?

A. I am a physician and surgeon. I graduated from Northwestern University Medical School in 1936. I have my M.D. degree from there.

I have a specialty in orthopedic surgery, which

(Testimony of Morris L. Goren, M.D.)

requires certification by the American Board of Orthopedic Surgery, which I have. And I am a member of the American Academy of Orthopedic Surgeons, as a specialist in that field.

Q. Thank you. Are you acquainted with the plaintiff, Porter Barrett, Doctor?

A. Yes, sir.

Q. Did you meet him as a patient of yours? [4*]

A. I did.

Q. And what was the date of that first meeting with Porter Barrett?

A. I first saw Mr. Porter Barrett in my office on December 27, 1955.

Q. Did he at that time complain to you of any injury from which he was suffering?

A. He did.

Q. And what did he complain of to you at that time, Doctor?

A. He complained of twitching and tenderness of the head and neck, and a throbbing of the head.

Q. Did you take a history from Mr. Barrett, at that time? A. I did.

Q. Will you state the history as you received it?

A. He stated to me: That while at work as a waiter on the Santa Fe Super Chief railroad train in a bent-over position looking into an ice box, another employee slammed the ice box door on his head, striking the top of his head and cutting the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Morris L. Goren, M.D.)

head. This occurred on March 11th, 1955. No stitches were required. He was knocked to the floor and felt dizzy. He kept on working. Since then he has nervousness and headaches and shakiness of the head.

He was seen by a doctor ten days after his injury, in Chicago. He was given tablets for pain. He worked [5] until December 17th, 1955.

He also has a feeling of cloudiness in his right eye and the muscles in the back of his neck jump and jerk.

He has tenderness on the vertex of his skull and he has to jerk his head without ability to control it.

That was the history I obtained from him.

Q. Now, Doctor, what treatment did you prescribe?

A. I prescribed medication for sedation. I gave him intravenous medication. I gave him physiotherapy and local injections into the spastic tender areas in his neck in order to control his spasm.

Q. What was the nature of the physiotherapy?

A. Heat, electric lights, and neck traction.

Q. And by neck traction, Doctor, will you explain that to the court and the jury?

A. Neck traction consisted of an appliance applied to the head and neck with a pulley and weight attached overhead, to allow the muscles to be stretched and relieve the weight on his nerves which may be pressing and causing the difficulty.

Q. Did that course of treatment start from the time you first saw Mr. Barrett?

(Testimony of Morris L. Goren, M.D.)

A. Yes. I started him on treatment on the next visit. That was December 30th, 1955.

Q. And did those same treatments continue up to the [6] present time? A. Yes, sir.

Q. When did you last see Mr. Barrett?

A. The last visit in my office was on the 16th of May, 1956.

Q. And during the interim, how many times have you seen Porter Barrett and treated him?

A. All together, 28 visits.

Q. What diagnosis did you make?

A. The diagnosis I made was spasmodic torticollis due to trauma.

Q. And by Trauma, do you attribute that to the injury and blow he received on the head——

A. Yes.

Q. ——March 11th? A. Yes, sir.

Q. Have you any idea or opinion as to how long he will have this, these symptoms or this condition?

A. Yes; I do.

Q. How long, Doctor?

A. It may last the rest of his life. It is a chronic condition.

Q. I see. Now, have you brought your doctor bill up to the present time? A. I have. [7]

Mr. Werner: Well, I will introduce that in evidence.

The Court: You may approach the witness, if you care to.

(Testimony of Morris L. Goren, M.D.)

Mr. Werner: Yes, your Honor.

Thank you, Doctor. I will ask that this be introduced in evidence as Plaintiff's Exhibit 1, your Honor.

Mr. Welsh: May I see it?

Mr. Werner: Yes, certainly, Mr. Welsh. Pardon me.

Mr. Welsh: That is perfectly all right.

You don't want all three copies introduced, do you?

Mr. Werner: No. I will even give you one of them.

Mr. Welsh: Well, that is very kind of you.

Mr. Werner: And I will keep one.

The Court: It will be received.

(Said document was received and marked as Plaintiff's Exhibit No. 1 in evidence.)

Q. (By Mr. Werner): And the amount of that bill, Doctor—— A. Was \$335.00.

Q. That is up to including the last treatment?

A. Yes, sir.

Q. Now, tell me what future medical care will be necessary to treat and control this condition of his?

A. He will require continuous observation and care from 2 to 3 times a week in order to give him some form of relaxation of his muscles, and also sedation for his complaints of pain, for many [8] months.

Q. Well, in your opinion, if you have any idea, what would be the cost of the medical care for the next year or year and a half?

(Testimony of Morris L. Goren, M.D.)

A. Approximately five to six hundred dollars a year.

Q. You took X-rays, didn't you, Doctor?

A. I did.

Q. And you have brought them with you?

A. I have.

Q. And I believe they are negative, are they not?

A. They show no fractures or abnormalities in the bony structures.

Mr. Werner: That is all. You may cross-examine.

Cross-Examination

By Mr. Welsh:

Q. Dr. Goren, did Mr. Barrett tell you this accident happened on March 11th?

A. As far as he could recall, that was his date of the accident?

Q. That is what he told you? A. Yes, sir.

Q. And did he also tell you that this twitching in the neck didn't start until about eight weeks later, in May? A. Maybe so; yes, sir.

Q. Do you remember his telling you that?

A. I do not recall correctly the exact time, but it [9] did not start right at that particular time, but it developed gradually.

Q. You made a report to Mr. Werner, after you examined him (the plaintiff) in December, did you not? A. I did.

Q. In that report to Mr. Werner, you didn't mention when the torticollis or twitching of the

(Testimony of Morris L. Goren, M.D.)

neck started, did you? A. No, sir; I did not.

Q. Do you know whether or not—now, I am just asking you for your memory; I know you see a lot of patients, Doctor; I don't want to be exact in asking you to remember something that may be impossible, but can you remember whether or not when you first examined him he told you that it was about eight weeks, or something of that sort, after the blow before his neck began to twitch?

A. During the initial history taken in examination he didn't give me that information.

Q. Now, that letter that you wrote of December 27th, or thereabouts, that was written as a result of your initial examination, wasn't it?

A. Yes, sir.

Q. And at that time he hadn't mentioned that it was about an eight-week period before this twitching started.

Now, normally you would expect this twitching to happen [10] a lot more closely to the accident, wouldn't you? A. No, sir.

Q. You would not?

A. No, sir. It is a gradual process of developing.

Q. As a matter of fact, it is what they call a functional and not an organic thing; isn't that right? A. It may be.

Q. Well, didn't you send Mr. Porter Barrett to a psychiatrist by the name of Dr. Heifetz?

A. I sent him to a neurosurgeon by the name of Dr. Heifetz.

(Testimony of Morris L. Goren, M.D.)

Q. Isn't he a neuropsychiatrist?

A. He is a neurosurgeon.

Q. And did Dr. Heifetz tell you that in his opinion this was a functional overlay?

A. It was his opinion that this man had a fairly severe cerebral concussion, with a functional overlay, with a functional condition of spasmodic torticollis, based upon a marked emotional reaction.

Q. A marked emotional reaction, are those the words? A. Yes, sir.

Q. Now, just for clarity when you speak of a condition being functional, you mean there that there isn't any physical pain of causation, but rather, that it is a fear, [11] apprehension or anxiety on the part of a patient which induces a physical pain; isn't that right?

A. Well, actually we do not know what would bring it on, but we speculate and say that it may be because of that anxiety, tension which has caused him to bring on this condition.

Actually we know that this man did sustain a head injury and following that head injury certain pressures developed, including this spasmodic torticollis.

Whether there is actual lesion in the brain which is causing this excessive mobility of his head and neck or an emotional process which could also cause his condition, we do not know.

Q. When did you first learn from the patient, or anyone else, that the twitching of the neck did not

(Testimony of Morris L. Goren, M.D.)

start until about eight weeks after the blow to the head, if you can remember?

A. Well, further questioning of the patient during my frequent contact with him elicited that history.

Q. Was it when you read Dr. Heifetz's report?

A. I don't believe so.

Q. Now, you Doctors have what are known as subjective symptoms and objective symptoms when you examine a patient; is that right?

A. Yes, sir. [12]

Q. The objective symptoms are things that you as a physician can tell without the aid of the patient, is that generally right? A. Yes.

Q. And your subjective symptom is a communicated symptom, in other words, the patient tells you when he hurts, or something of that sort, am I correct about that? A. That is correct.

Q. Now, Doctor, you gave this plaintiff a complete physical examination, didn't you?

A. I did.

Q. You took X-rays of his skull, is that right?

A. Yes.

Q. And you took X-rays of his neck?

A. I did.

Q. And you took X-rays of his neck both from a side view and a front view, isn't that right?

A. Yes, sir.

Q. You didn't find anything wrong, did you?

(Testimony of Morris L. Goren, M.D.)

A. As far as the bony architecture was concerned, it was within normal limits.

Q. Did you test the sternocleidomastoid muscles and the trapezius muscles? A. I did.

Q. And incidentally, would you please explain to us [13] where those muscles are, sir?

A. The sternocleidal muscles are muscles extending from the sternum, which is the breastbone, and these are the large muscles coming up to the mastoid behind it here. This was the sternocleidomastoid muscle.

The trapezius is a large muscle extending from the base of the skull down to the lower end of the dorsal spine, which is the vertebral column adjacent to the ribs, and also to the shoulder blade. It is a large triangular muscle.

Q. Now, you didn't find anything abnormal about either of those muscles, did you?

A. Yes. He had tenderness over the right sternomastoid incision.

Q. By tenderness, when you felt it he complained of pain, is that right?

A. By palpitation over that region of the right mastoid incision he had tenderness in that region, and there was intermittent spasm, in other words, that muscle goes into a spasmodic state and throws his head in certain peculiar positions, the jerking of the head and neck.

However, by taking the head and neck manually, passively I could bring them into normal mobility

(Testimony of Morris L. Goren, M.D.)

in either direction voluntarily, I mean as far as passively was concerned. [14]

Q. Yes. Well, you didn't find any hypertrophy or swelling or enlargement of either of those muscles, did you?

A. I wouldn't say that I found any marked, any marked hypertrophy to see.

Q. And when you do not use a muscle, it withers and becomes atrophied or smaller, isn't that right?

A. Yes.

Q. And when you use one more than normally, it swells and becomes enlarged or hypertrophied, isn't that right?

A. I wouldn't say when it swells. When we talk about swelling, we mean a disease.

Q. I am using that as a lay expression, meaning that it enlarges.

A. Well, if the muscle is used excessively, this man is going to develop eventually an enlargement of that particular muscle.

Q. Well, these two muscles we have been talking about, the one that goes from the mastoid down to the breast bone and that triangular muscle you described of the shoulder, where you have a twitch or a torticollis, that shows up fairly quickly, in other words, you find the enlargement fairly quickly if the torticollis develops?

A. I wouldn't say that. It takes time for any muscle to develop.

Q. If it would develop, it would certainly develop within [15] six months, wouldn't it?

A. It may.

(Testimony of Morris L. Goren, M.D.)

Q. And you didn't find any, did you?

A. I didn't notice it.

Q. No. And you knew that from May, 1955, to December, 1955, he had complained of having this twitching, isn't that right? A. Yes.

Q. All right. Using these tests, objective tests we have been talking about, then you can tell by feeling with your hand if the muscle did become larger or smaller, can't you?

A. Well, but one must remember that the movement of the head is a contracted process and he jerks his head one way——

Q. All right, Doctor, I asked you a question. Well, all right. This was one of those objective tests?

A. Yes; but in order to explain, I would like to elaborate.

Q. You may explain, Doctor. It is an objective test? A. Yes.

Q. All right; go ahead and explain.

A. In order to evaluate enlargement, one must cut out or stop movement to the outside, but in his case, in order to bring his head to the normal position he was also using [16] the other muscle, so that they are both of the same size, so we cannot say that one is larger than the other.

Q. At any rate, you didn't find any?

A. No, sir.

Mr. Welsh: All right, Doctor, thank you very much.

(Testimony of Morris L. Goren, M.D.)

Q. You have no history of unconsciousness after this blow, do you, Doctor?

A. He was light-headed, but he was not unconscious.

Q. Did he tell you that he worked from March, 1955, when this occurred, through December of 1955?

A. Yes, sir.

Q. And did he also tell you that he saw no physicians at all between May of 1955 and December of 1955, when he came to see you?

A. I have no history to that effect.

Q. He didn't say one way or the other?

A. No, sir.

The Court: We will take a short recess.

Ladies and gentlemen of the jury: During the recess period, don't discuss this case amongst yourselves or with anyone else and don't form or express any opinion until the case has been finally submitted to you. We will recess for about five minutes.

(Recess.)

The Court: May it be stipulated that all the members of [17] the jury are seated in the box?

Mr. Welsh: It is so stipulated, your Honor.

Mr. Werner: Yes, sir.

You may proceed, Mr. Welsh.

Q. (By Mr. Welsh): Dr. Goren, do you have a copy of Dr. Heifetz's report to you?

A. I do.

Q. Will you kindly turn to the second page of it and under "Tentative Diagnosis:" paragraph 2,

(Testimony of Morris L. Goren, M.D.)

does Dr. Heifetz state, "Spasmodic torticollis, etiology, severe anxiety reaction"? A. Yes.

Q. Taking that sentence part by part, "spasmodic" means this tic in the neck that we can see, of Mr. Barrett, isn't that right? A. Yes.

Q. An etiology, what does that mean?

A. The origin of which.

Q. All right. So that it means that the origin of the tic in the neck is a severe anxiety reaction, is that what the sentence means?

A. Severe. Yes.

Q. Now, Mr. Barrett was referred to you by Mr. Werner, his counsel, was he not?

A. No, sir. He was referred to my office by [18] Dr. Darrington Weaver.

Mr. Welsh: By Dr. Weaver.

Thank you. No further questions.

Mr. Werner: No further questions. Thank you, Doctor.

May the Doctor be excused?

Mr. Welsh: Yes. The Doctor may be excused.

The Court: Yes.

Mr. Werner: Thank you, Doctor, very much.

Mr. Porter Barrett, take the stand.

PORTER BARRETT

the plaintiff herein, called as a witness on his own behalf, being first duly sworn, testified as follows:

The Clerk: Give us your full name?

A. Porter Barrett.

Direct Examination

By Mr. Werner:

Here is the original deposition, your Honor. I would like to file it with the Clerk.

The Court: All right; you may file it.

Mr. Welsh: May I inquire, your Honor: Three depositions were taken in Chicago. I wonder if they have arrived and are filed with the Clerk?

The Clerk: Yes.

Mr. Welsh: Thank you.

Q. (By Mr. Werner): You are the plaintiff in this action? A. Yes. [19]

Q. And where do you reside, Mr. Barrett?

A. 7441½ East 32nd Street.

Q. What is your business or occupation?

A. A waiter.

Q. And by whom were you last employed?

A. The Santa Fe Railway.

Q. And what was the date of your first employment there? A. In May, 1946.

Q. And at the time you were employed, were you given a physical examination? A. Yes.

Q. Before you were accepted? A. Yes.

Q. What? A. Yes, sir.

Q. And what was the condition of your health

(Testimony of Porter Barrett.)

at that time? A. Good.

Q. What is your age? A. 43.

Q. Have you worked continuously for the Santa Fe railroad from the time you were first employed in 1946 until we will say December 17th, 1955?

A. Yes.

Q. On the occasion in question here, what train were you [20] working on?

A. The Super Chief.

Q. And in which direction were you proceeding on this occasion? A. Westbound.

Q. And you have alleged in your complaint that you were struck on the head on March 11th. At or near, if you know, what station or town did this occur?

A. Somewhere just west of Joliet, Illinois.

Q. About what time of day or night?

A. It was around 8:45 or 9:00 o'clock at night.

Q. Well, where did it happen in this dining car?

A. It happened in the pantry.

Q. And in respect to what object there? I mean what were you using at the time that it occurred?

A. I was in a stooped-over position looking in——

Q. Well, I know.

The Witness: I don't think I understand.

Q. (By Mr. Werner): Was it an ice box or a chill box? A. Oh, a chill box.

Q. How? A. A chill box.

Q. And describe the chill box to the court and to the jury, to the best of your ability.

A. The chill box is, oh, approximately 3, 3½

(Testimony of Porter Barrett.)

feet [21] high, about 3 feet wide and 6 or 7 feet long.

Q. And has it doors on it?

A. Yes; it has two doors.

Q. And state whether the doors close to the middle or open from the middle.

A. They close to the middle. They open——

Q. And they were hinged on each end of the chill box?

A. Yes.

Q. And what space was there between them when the chill box was closed—is closed?

A. It is a very small piece of metal.

Q. No. I mean in respect to inches, what space was there between the two doors, if you remember?

A. Oh, approximately an inch.

Q. What is the material on these doors made of, if you know?

A. Kind of heavy aluminum doors, or something like that, metal I guess you would call it; metal.

Q. Well, you mean representing certain stainless steel; did that appear to be stainless steel?

A. Yes, they could have been; yes.

Q. I just want your description for the court and jury is all.

A. Yes.

Q. Were you waiting on some customers at that time? [22]

A. Yes.

Q. And had you gone to the chill box to obtain some object or material?

A. Yes.

Q. Now, what position were you in?

A. I were in a stooped-over position.

Q. And which side of the box were you using?

(Testimony of Porter Barrett.)

A. The lefthand side.

Q. You were using the lefthand side?

A. That is right, sir.

Q. And just tell us in your own words just what happened?

A. Well, while I was in this stooped-over position, the object I was looking for, I don't remember what it was, my face was facing east then, my back was to the west and this other waiter came up to get something which I don't remember what he were looking for, then, during the present; at the time he finished, before I did, and he just slammed the door which struck the center of my head.

Q. What happened to you?

A. I was dazed for a few minutes, sitting in the middle of the pantry floor.

Q. Did your head bleed? A. Yes, sir.

Q. Did you suffer pain at that time?

A. Oh, yes. [23]

Q. Where?

A. In my head, my neck, had throbbing of the eye and watering of the eye.

Q. Was it at that time you had the pain in your eye?

A. Well, I wouldn't say it started right that particular night. It started later on.

Q. Well, state what happened. Did your head bleed? A. Yes, sir.

Q. And which portion or which part of the head was struck?

(Testimony of Porter Barrett.)

A. The very center of my head, I guess you call it.

Q. Well, point to the portion.

A. (The witness indicates.)

Mr. Werner: I think the witness is pointing to the knoll——

The Witness: To the knoll of my head, I guess you call it (indicating)—the center of it.

Mr. Werner: The center of his skull.

Q. Your head, how much did it bleed, if you can remember?

A. Well, it bleed for quite a while.

Q. And did any of the other waiters help you to staunch the flow of blood? A. Yes.

Q. And was it necessary for you to change your costume or your coat? A. Yes, sir.

Q. And did you finish waiting on the table that you had [24] begun to wait on that evening?

A. No, I didn't.

Q. But later that evening I believe you finished the night's work, is that correct?

A. Right, sir.

Q. And now tell me, when was the first time that you went to see a doctor?

A. During the month of April I saw a doctor.

Q. And what was his name?

A. Dr. Bernard Jacobs.

Q. Did he treat you?

A. He examined my head.

Q. Well, he examined your head, but did he treat you? A. No; no, sir.

(Testimony of Porter Barrett.)

Q. What did he advise you to do?

A. He advised me to go to my own company doctor.

Q. All right; and did you go to your own company doctor? A. Yes.

Q. And was that at the Santa Fe Hospital here in Los Angeles? A. Yes.

Q. Do you remember whether you were examined by a doctor, at that time? A. Yes. [25]

Q. Did you complain to him about any pain that you were suffering? A. Yes.

Q. What did you complain to him about?

Mr. Welsh: Well, I object to that, your Honor. What he complained about is not evidence. He can tell what his condition was, but it would be just a self-serving statement to say what he said to someone else.

The Court: Overruled.

Mr. Werner: All right. Answer the question, Mr. Barrett.

A. Oh, I complained to him I had severe headaches, my eye was throbbing, watery, and my neck was very stiff.

Q. All right. Did your head ache at that time?

A. Severe headaches, yes, sir.

Q. And your neck hurt you? A. Yes.

Q. And your eye throbbing? A. Yes.

Mr. Welsh: What Doctor?

Mr. Werner: The Santa Fe Doctor. I don't think he knows his name, but that is in the deposition.

Mr. Welsh: Pardon me. I would request that the

(Testimony of Porter Barrett.)

evidence be stricken as not having laid a proper foundation, unless the witness is asked the name of the physician to whom he allegedly made those statements. [26]

Mr. Werner: All right. I will back up and——

The Court: I understood him to testify that it was a Doctor in the Santa Fe Hospital.

Mr. Werner: Yes, he did.

The Court: You may inquire to see whether or not he knows the Doctor's name.

Mr. Werner: I don't think he remembers the name.

Q. Do you remember the name of the Doctor that examined you at the Santa Fe Hospital?

A. I do not.

Q. And did he advise you what to do, at that time? A. Yes.

Q. What did he advise you to do?

A. On my return trip to Chicago to see a Doctor when I got there.

Q. All right. And did you do that?

A. Yes.

Q. Now, when you got to Chicago, how many Doctors did you see?

A. I believe I saw four Doctors, I believe, sir.

Q. Do you know—do you remember who the first Doctor was that you saw? A. Dr. Matthews.

Q. And is he a Santa Fe Doctor?

A. Yes, sir. [27]

Q. And do you remember the date that you saw him?

(Testimony of Porter Barrett.)

A. The 22nd of April, I believe it was, sir.

Q. Were you suffering at that time from any pain? A. Yes.

Q. Where?

A. Headaches, throbbing of my eyes, watering, and my neck was stiff.

Q. Did you complain of those things to Dr. Matthews? A. Yes.

Q. Did Dr. Matthews recommend any treatment at that time? A. Yes.

Q. What, if you know?

Mr. Welsh: Your Honor, I object to that as purely hearsay. We have the deposition of Dr. Matthews. It was taken upon stipulation of the parties. What Dr. Matthews told him would be purely hearsay as far as this defendant is concerned.

The Court: The objection is overruled. He may testify to it.

Mr. Werner: I have here—did Dr. Matthews give you—

The Clerk: Do you want that marked?

Mr. Werner: I haven't introduced it in evidence. I am going to—

The Clerk: Just mark it?

Mr. Werner: Oh, yes.

The Clerk: Plaintiff's Exhibit 2 for identification. [28]

(Document marked Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Werner): I have here what pur-

(Testimony of Porter Barrett.)

ports to be an order of Dr. Matthews. I will ask you to examine that. Have you ever seen that before?

A. Yes.

Q. And what is it?

A. It is an order from Dr. Matthews for me to be admitted into Topeka Hospital, railroad hospital in Topeka, Kansas.

Mr. Welsh: The document will speak for itself, your Honor.

The Court: Are you going to put the document in evidence?

Mr. Werner: Yes, I want to introduce the document.

The Court: Very well. It speaks for itself.

Mr. Werner: Yes, your Honor.

The Court: Have you offered it in evidence?

Mr. Werner: I am offering it in evidence now as Plaintiff's Exhibit——

The Clerk: Plaintiff's Exhibit 2.

Mr. Werner: ——2.

The Court: All right. It will be received.

(Said document was received in evidence and marked as Plaintiff's Exhibit No. 2.)

Mr. Werner: Now I would like to read this to the jury, [29] your Honor, in order to make my subsequent questions intelligible.

The Court: All right. You may read it.

Mr. Werner: This is:

(Testimony of Porter Barrett.)

“Santa Fe Hospital Association

Recommendation for Admission to Hospital

Surgeon in charge of A. T. & S. F. Hospital:

The bearer, Porter Barrett, employed as a waiter, is a member of the A. T. & S. F. Hospital Association, and in need of Hospital care. He has been ordered to me for examination by W. H. Ford. His residence is 6014 So. Parkway. His last employment commenced 5-8-46. He is now suffering from cephalgia and tenderness of scalp caused by contusion of scalp.

HENRY B. MATTHEWS,
Surgeon.

Chicago, Ill., Date: 4-22-55.

Referred for X-ray of Skull only.”

Q. (By Mr. Werner): Now, as a result of this, did you go to the hospital in Topeka, Kansas?

A. No.

Q. Why didn't you go, after the recommendation of Dr. Matthews? [30]

A. I was told to go to see some other Doctor, that it wasn't necessary for me to go to Topeka, by this Mr. Ford.

Q. And who told you not to do that?

A. This Mr. Ford.

Q. What was his position for the Santa Fe Railway?

A. I don't truthfully know. He has an office

(Testimony of Porter Barrett.)

there in Chicago, but I do not know his truthful position.

Q. All right. Did you only see Dr. Matthews once? A. Yes, sir.

Q. Who was the next Doctor that you went to see, if any, in Chicago?

A. I saw a Dr. Buttice.

Q. And is he a physician employed by the Atchison, Topeka and Santa Fe? A. Yes, sir.

Q. And do you remember the approximate date that you went to see him? A. No.

Q. Well, was it during the month of April, '55?

A. Yes; it could have been, yes.

Q. Just, Mr. Barrett, give your best recollection of these things. A. Yes; it was April.

Q. If you don't remember the exact date, just state what you remember, approximately. [31]

A. It was in the month of April.

Q. Did Dr. Buttice examine you? A. Yes.

Q. And were you suffering any pain at the time you went to see him? A. Yes.

Q. Where?

A. In my head, terrific headaches; my neck was very stiff at that time and my eye was throbbing and watering.

Q. And did you complain of those things to Dr. Buttice? A. Yes.

Q. How many times did you see Dr. Buttice?

A. Only once, sir.

Q. What did he do for you, if anything?

(Testimony of Porter Barrett.)

A. He examined me and taken X-rays of my head.

Q. Did he give you any treatment?

A. No, sir.

Q. Nothing for your headaches?

A. No, sir.

Q. Nothing for your neck? A. No, sir.

Q. Did you go to another Santa Fe doctor?

A. I did.

Q. Do you know his name?

A. No, I don't. [32]

Q. Do you know where his office is?

A. 105 South LaSalle.

Q. Did this Doctor examine you?

A. He treated me for—I wouldn't say examined me, no.

Q. Well, did you complain to him about the condition of your head and your neck and your eye?

A. Yes, sir.

Q. And did he give you any treatment?

A. Yes.

Q. What did he do for you, if anything?

A. He cleaned my ears out and give me some kind of——

Q. Were you suffering——

A. I didn't hear you?

Q. ——from anything wrong with your ear?

A. No, no.

Q. You complained of your head and your neck and your eye, is that correct?

A. That is right.

(Testimony of Porter Barrett.)

Q. And what else did he do for you, if anything?

A. He gave me treatments for my nose.

Q. And did you complain of anything being wrong with your nose? A. No, sir.

Q. And how many times did you see this Doctor?

A. 4 or 5 times. [33]

Q. Did you see any other Doctor in Chicago?

A. Yes.

Q. Well, do you know his name? A. No.

Q. Do you know where his office is?

A. It's 100 South, 104, something like that, South Michigan——

Mr. Werner: I see.

The Witness: I am not positive.

Q. (By Mr. Werner): Was he a specialist of any kind? A. He was an eye Doctor.

Q. An eye Doctor. Was that Dr. Ackerman?

A. It could be.

Q. And were you suffering from any disability or pain at the time you went to see him?

A. My eye; my head was—still had the terrific headaches; my eye was throbbing and watering and my neck was stiff.

Q. All right. What did he do for you, if anything? A. He examined my eye.

Q. And did he prescribe any treatment for your eye? A. No, sir.

Q. And what did you complain to him about, if anything?

A. That I had terrific headaches and with water

(Testimony of Porter Barrett.)

in my eye and the throbbing of my eye and that my neck was stiff. [34]

Q. All right. Do you remember the approximate date of this examination by the eye Doctor?

A. I believe it was May the 3rd or 5th, somewhere along in there.

Q. Did he prescribe any treatment for you?

A. I don't remember now.

Q. What?

A. I don't remember; no, he didn't.

Q. Now, when was the first time—I notice the jerking of your neck—when did you first notice this jerking of your neck and head?

A. Oh, the last of May or the first of June, somewhere along in there, I believe it was.

Q. And has that continued since that date?

A. Yes.

Q. And has it improved, gotten better or worse?

A. No; it hasn't.

Q. And finally, did you go to see your own Doctor again after having seen these numerous Santa Fe physicians? A. Yes, I did.

Q. All right. When was the next time you went to see your own Doctor? A. It was December.

Q. And who did you see at that time?

A. Dr. Jacobs, Dr. Bernard Jacobs. [35]

Q. Did he treat you? A. No.

Q. Prescribe any treatment for you?

A. He prescribed that I should see my own physician—Company doctor again; that is what he prescribed.

(Testimony of Porter Barrett.)

Q. All right. Whom next did you see then?

A. Dr. Weaver

Q. And did he treat you? A. No.

Q. Did he recommend you see another physician?

A. Yes, he did.

Q. And did he recommend Dr. Morris Goren?

A. Yes.

Q. And what date did you go to see Dr. Morris Goren? A. December 27th.

Q. 1955? A. Yes.

Q. Were you suffering any pain at that time?

A. Yes, sir.

Q. Where?

A. Headaches; my eye was throbbing, watering, and my neck was jerking like it is now.

Q. And did you complain to Dr. Goren about those things? A. Yes.

Q. Did he examine you at that time? [36]

A. Yes.

Q. Did he prescribe any course of treatment for these things from which you were suffering?

A. Yes.

Q. Well, tell the jury in your own words what he did for you, the best you can remember.

The Court: Hasn't the Doctor testified to all of that?

Mr. Werner: Well, all right. I would just as soon not cover it with him.

The Court: Unless you are trying to impeach the Doctor.

Mr. Werner: No; I am not. That is all right.

(Testimony of Porter Barrett.)

Your Honor, in respect to the earnings I think we have agreed on the amount of wages earned. Will the Court instruct the jury on that? I don't want to cover any ground unnecessarily.

The Court: Yes. I think that is in the Pretrial Order.

Mr. Welsh: It is in the Pretrial Order.

Mr. Werner: It is in the Pretrial Order.

The Court: Then, you can submit an instruction on that. You can submit an instruction on that.

Mr. Werner: Thank you, your Honor.

I think you may cross-examine.

Cross-Examination

By Mr. Welsh:

Q. Mr. Barrett, you are still employed by the Santa Fe, are you not? [37] A. Yes.

Q. You are on leave of absence, is that correct? A. Yes.

Q. You still hold your same seniority in the Dining Car Department, do you not, sir?

A. Yes; I think so.

Mr. Welsh: Yes. Now, I have here some photographs that purport to be photographs of ice box. Pardon my back.

Mr. Werner: As long as you state that is the ice box, I have no objections, Mr. Welsh.

Mr. Welsh: I will ask Mr. Barrett.

Would you like to mark these, first; or shall I just have them identified?

(Testimony of Porter Barrett.)

The Court: You better have them marked for identification.

The Clerk: Defendant's Exhibits A, B and C.

(Said photographs were marked as Defendant's Exhibits A, B and C, for identification.)

Mr. Welsh: Thank you.

Q. Mr. Barrett, I show you a photograph designated as Defendant's Exhibit A, which purports to be a picture of the chill box in an open position. Does that look like the chill box that was involved in this accident? A. No. It doesn't.

The Court: Keep your voice up. [38]

The Witness: No.

Q. (By Mr. Welsh): Why doesn't it?

A. It doesn't look like a Super Chief chill box. It is not a Super Chief chill box.

Q. Well, I will ask you if you will look at that closely and see if that isn't the chill box on Car 601, the car you were on when you were injured?

A. Oh, I couldn't say that. No; I don't know whether that would be on 601, you know, I couldn't say what it was.

Q. And it doesn't look like the one you got konked on the head with? A. No; it doesn't.

Q. I show you Defendant's Exhibit B for identification, and ask you if that is a fair representation of the chill box that was involved in this accident? A. No. No; it doesn't.

Q. Can you please point out what the differences

(Testimony of Porter Barrett.)

are between the ones shown on photographs A and B, and the one that was involved in the accident?

A. Well, the only difference that I can see here, that the strip here is much larger than they are on the Super Chief diners and the floor is different here from what they use or that you walked on, and the doors are much larger here.

Q. The what, the doors are larger? [39]

A. Yes, and this metal strip is much larger

Q. All right. Can you tell what position of the pantry that chill box is in from the photograph; are you able to tell that?

A. Yes, it is on the right-hand side of the pantry as you go in.

Q. Is that the same side the chill box was on, where you got injured? A. Yes, sir.

Q. All right. Now, forget about the floor mat, because the floor mat hasn't anything to do with the chill box.

Is that chill box the same except for the fact that you say there is a wider space in between?

A. Yes.

Q. And you say the door is longer, is that right?

A. Much longer, yes.

Q. All right. Let me show you Exhibit C and ask you if that looks like the chill box which was involved in this accident? A. No, sir.

Q. Why doesn't Exhibit C reflect the true picture of the chill box which was involved in this accident?

A. Because they are just like the first two that

(Testimony of Porter Barrett.)

I have looked at here; they are very much different. They are all the same, in other words, to me they are all the [40] same box.

Q. Well, that is true, they are all the same box.

When was the last time that you have seen the chill box that was involved in this accident?

A. I haven't seen it since December 17th, 1955.

Q. So you are judging from your recollection since December, is that right?

A. That is right, sir.

Q. How many different dining cars did you use on this Super Chief run, one or two, or how many on these different runs?

A. They had one standard car that they use, so far as I know.

Q. They have just one car on each piece of equipment, is that right; one dining car?

A. Yes, sir.

Q. Was the same dining car used on every piece of equipment, in other words, every train that went out of Chicago or went out of Los Angeles didn't have the same dining car on it, did it?

A. I don't think I understand what you mean?

Q. Well, you were on this run regularly, on the Super Chief, is that right?

A. That is right.

Q. You would leave Chicago, come to Los Angeles, and turn [41] around and then go back to Chicago and you would lay over in Chicago for a few days, is that right?

A. That is right.

Q. And then you would take another train out?

A. Yes, that is right.

(Testimony of Porter Barrett.)

Q. Did you always have the same car that you rode on or were there different dining cars on the Super Chief?

A. When our turn would come, we would take a different dining car, yes.

Q. Well, do you know the numbers of the cars, the car numbers of the dining cars that are used on the cars that you were on?

A. That run were six hundred series, 601, '2, '3, '4, '5, '6, something like that.

Q. All right. Were the chill boxes on those cars different ones from the other insofar as their dimensions were concerned, or were they all the same?

A. Yes, they are more modern type of cars. Yes, they were different from the older type dining cars; yes.

Q. Well, there are some chill boxes on some of those cars that are more modern than the ones shown on these photographs, is that right?

A. Yes, sir; that is right.

Q. The kind you were injured on, was it the more modern type, or was it the general type designated by these [42] photographs?

A. More modern type.

Q. Yours were more modern? A. Yes.

Q. And you don't know what car you were on at the time?

A. No. I was on the 600's. It was in the 600 series, but I don't know what car it was on.

Q. Well, if I may just put these on the witness stand there, your Honor. I would like you to examine these three photographs and tell me in what

(Testimony of Porter Barrett.)

way the one you were injured on was more modern than that? What was more modern about it?

A. Well, there isn't enough of this picture to picture the different modern size of the pantry, because I only see two doors.

Q. How many doors are there on a chill box?

A. There are only two swinging doors and it has doors on top also—lids, lids.

Q. Well, can you tell from looking at that whether it is or it is not a more modern type?

A. Yes. This was not a modern type.

Q. Tell me, what makes you say that? What is there that you see there that you wouldn't expect to find?

A. Well, it is the doors and the box itself.

Q. Tell me, what does the more modern one look like? [43]

A. I believe the doors are shorter. I can say that I believe the ridges between the doors are smaller.

Q. And that is the difference between this type and the more modern type, is that right?

A. As near as I can remember, yes.

Q. Have you ridden on all of these different runs, 601, '2, '3 and '4?

A. I won't say that I have caught them all, no.

Q. Have you caught most of them?

A. I would say yes.

Q. You have?

A. I would say I have caught about half of them, I guess, something like that.

(Testimony of Porter Barrett.)

Q. On any of the runs that you ever ran, did you ever see a door—chill box like this one?

A. Yes.

Q. You have? A. Yes.

Q. On the Super Chief? A. No.

Q. Never on the Super Chief? A. No.

Mr. Welsh: All right. Now, these photographs will be available if you want to look at them during recess. May I get the photographs, your Honor. [44]

(Mr. Welsh removes photographs from the witness table.)

The Court: We will recess.

Ladies and gentlemen of the jury: During the recess period, keep in mind the admonition heretofore given. Do not discuss the case or form an opinion until the case is finally submitted to you.

We will recess until 2:00 p.m.

(A recess was taken until 2:00 p.m., of the same day, Tuesday, May 22, 1956.) [45]

* * *

PORTER BARRETT

the plaintiff herein, having been previously duly sworn, resumed the witness chair, and testified further, as follows:

Cross-Examination

(Continued)

By Mr. Welsh:

Q. Mr. Barrett, did you have a chance to look at the photographs after the court recessed at noon?

A. Yes, sir.

Q. Do you wish to change your testimony in any way concerning them, or are you satisfied to leave it stand as is?

A. No. I will say that they are pictures of a dining car.

Q. I will show them to you, again, Mr. Barrett——

May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Welsh, continuing): ——Exhibits A, B and C for identification, Mr. Barrett, and state your opinion, now, after having more calmly reflected and looked at the pictures, that they do or do not fairly represent the chill box where your accident occurred? [47] A. Yes.

Mr. Welsh: They do. I would like to offer them into evidence at this time.

The Court: They will be received.

(Said photographs were received in evidence as Defendant's Exhibits A, B and C.)

(Testimony of Porter Barrett.)

Mr. Welsh: May I have the privilege of passing them to the jury, sir?

The Court: Yes.

Mr. Welsh: Thank you.

The Court: The bailiff will take them over and pass one down the front row and one down the back row.

Mr. Welsh: May I have Exhibit 2, please, Mr. Clerk? Thank you. May I approach the witness?

The Court: Yes.

Q. (By Mr. Welsh): I call your attention, Mr. Barrett, to Exhibit 2, the release from Dr. Henry B. Matthews and call your attention that down at the left-hand corner it says you are "Referred for X-ray of Skull only," that is, referred to the hospital for an X-ray of skull only. Was that on it at the time Dr. Matthews gave it to you?

A. Yes.

Q. It was, and did Dr. Matthews tell you he was referring you to the Topeka Hospital for the skull X-ray only? [48]

A. Yes.

Q. Now, you testified that you didn't go to the Topeka Hospital, but did you have X-rays taken of your skull?

A. Yes.

Q. In Chicago?

A. Yes.

Q. By a physician?

A. Yes.

Q. And you were informed, I suppose, in the course of events, of the results of those X-rays, were you?

A. No; I wasn't.

Q. You were not?

A. No, sir.

Q. You were informed of the results of X-rays

(Testimony of Porter Barrett.)

taken by doctors, taken here in Los Angeles, later, is that right? A. No.

Q. Dr. Goren didn't tell you what the results of his X-rays showed? A. No.

Q. Now, do I understand correctly that the first doctor that you saw was about April 17th, 1955?

A. I would say yes, along that, 17th or 18th, 19th, somewhere along there.

Q. And where was that, Mr. Barrett?

A. Here in Los Angeles. [49]

Q. Now, then, your accident happened on the 11th of March, so that would mean, I assume, that you arrived in Los Angeles on the Super Chief on March 13th, is that correct? A. Yes, yes.

Q. And then did you leave again on the 14th to return to Chicago? A. Yes.

Q. And you would have arrived in Chicago on the 16th of March, is that correct?

A. Yes; that is correct.

Q. And you would have laid over in Chicago about four days and then made another trip out to the Coast. Did you do that? A. Yes.

Q. In other words, you followed your regular routine from March 11th and then on April 17th, when you were again in Los Angeles, which would have been about the third trip, you went to see the Santa Fe doctors in Los Angeles, is that right?

A. Yes.

Q. They suggested that you go to Chicago and see the doctors there, right?

A. Yes; that is right. [50]

(Testimony of Porter Barrett.)

Q. Now, you are hired out of Chicago, are you not, sir?

A. No. I was transferred from here to Chicago. I were hired——

Q. Well, before March 11th, you were transferred? A. Yes.

Q. Well, that is right. As of the date that the accident occurred, you were employed out of the Chicago office, is that correct? A. Yes.

Q. And you belong to the Hospital Association in that area, in the Chicago area, am I correct about that? A. I would say you are, sir, yes.

Q. I didn't hear you. A. Yes.

Q. Yes, and so you were referred back to those doctors back in that area, am I correct?

A. Yes.

Q. Would you like a little rest?

A. No. You can continue. I have a terrific headache, but that is quite all right.

Mr. Welsh: I don't want to—I just want you to know if at any time you would like a rest, please let the court know.

Now, I would like to make a sketch. Your Honor, may I use the blackboard? [51]

The Court: Yes.

Mr. Welsh: Can your Honor see it?

The Court: That is all right.

Mr. Welsh: If the court and counsel have no objection, I will put on a little diagram of the car,

(Testimony of Porter Barrett.)

myself, but if you prefer I will have the witness do it.

Mr. Werner: I have no objection at all. I imagine you can do it very well, too.

Mr. Welsh: No, I am not an artist. I thought it would save the witness coming down here.

Mr. Werner: All right. That is fine.

(Mr. Welsh draws diagram on the black-board.)

Q. (By Mr. Welsh): Can you see this, Mr. Barrett? A. Yes.

Q. Now, you will remember that I am not much of an artist and this is not to scale, but this is meant to represent a dining car. The squares at the bottom are the tables at which the people sit. At this space here on which I will put a "1" is the vestibule; and this long, narrow corridor is the corridor people walk down in order to get to the tables; and then in the square, this is meant to be the kitchen (Mr. Welsh writes "Kitchen" in said square); and the lower portion the pantry (Mr. Welsh wrote the word "Pantry" in said portion of the blackboard sketch). Excuse my inartistic endeavor. Do you recognize that as the [52] general layout of the dining car that you were serving on when this accident occurred? A. Yes; it is something similar, yes.

Q. Could you come here and correct it?

Mr. Werner: Oh, I think that is silly.

Mr. Welsh: I confess that I am merely attempt-

(Testimony of Porter Barrett.)

ing to do it from my general knowledge, and if there is something you can come and help me with, I will appreciate your doing it.

The Witness: Well, you do what you have your way, but I don't know that I could do any better.

Q. (By Mr. Welsh): All right. Could you tell me this: Could you either come down and place it here, or tell me where to place the chill box that was the center of this accident?

A. Well, take the pantry there, the chill box would be over on your right-hand corner from wall to wall.

Q. Right here (indicating).

A. From wall to wall there.

Q. Right here (indicating)? Is that correct?

A. Yes.

Q. Now, above the chill box, forming the top of the chill box is sort of a work space, is that right?

A. That is right.

Q. So that the chill box doors would be underneath [53] that top surface, is that correct?

A. That is correct.

Q. All right, sir. Fine. What is it that divides the kitchen from the pantry?

A. It is the steam table and work bench.

Q. The steam table and work bench?

A. From the pantry side, yes—the kitchen side.

Q. And you picked up the orders from the steam table?

A. From the inside of the pantry there is a work bench which we pick up from, yes.

(Testimony of Porter Barrett.)

Q. What?

A. There is a work bench there, we call it, where you pick up from the kitchen.

Q. You can pass through from the kitchen into——

A. No, no.

Q. You can't? A. No, no.

Q. How do the cooks get the food from the kitchen out onto the steam table?

A. There is a high ledge up there where to put, set your food up there on the ledge, and you just reach up and get it.

Q. The cooks put the food up on the ledge?

A. Yes.

Q. Then the waiters pick it up from the ledge?

A. Yes. [54]

Q. About this high (indicating)?

A. No. It isn't that high. It is about to here (indicating), I guess.

Q. Then, you can look from the ledge into the pantry? A. Yes.

Q. Then I just want to get the general orientation. As I recall, you went in and opened up one of the doors on this chill box, am I correct about that——

A. Yes.

Q. ——with two doors, as the photographs show? A. Yes.

And you opened up one of them? A. Yes.

Q. Do you remember, at this time, what you were looking for? A. No, I don't.

Q. While you were looking in there, in the chill

(Testimony of Porter Barrett.)

box, do you recall that another waiter came around on the other side and opened up the other chill box door? Do you, sir? A. Yes.

Q. And you were aware of the fact that this other waiter stooped down and took something out of his side of the chill box, were you not, sir?

A. I don't remember it, sir.

Q. Well, you knew that the door was opened by another [55] waiter, the other door?

A. No, I don't recall him even being there at all.

Q. I am sorry. I didn't hear you.

A. I say, I don't recall him being there.

Q. Let us go back now; and I don't want you to be confused. You went in and opened up—There are two doors on this chill box, aren't there?

A. Yes.

Q. You opened up one of the doors and you were looking for something and you can't remember what, now? A. No.

Q. But you were looking for something?

A. Yes.

Q. Now, you remember while you were looking that another waiter came and opened up the other door; do you remember that?

A. I don't recall him even being there at all, when I was looking in there; no.

Q. When did you first remember that he was there?

A. After I was struck on the head and kind of got myself back together, I recall that somebody

(Testimony of Porter Barrett.)

said somebody slammed the door on my head. I don't know actually who was there.

Q. Well, you don't know the name of the waiter who was there? [56] A. No, sir.

Q. Let us go back to the time you were looking in the chill box. A. Yes.

Q. Before the accident happened; now, you didn't know the name of the waiter that was standing next to you? A. No, sir.

Q. Well, you knew if there was a waiter or a person standing there, didn't you?

A. That is possible; yes, several of us were in there at one time, yes.

Q. Well, you remember, you knew he was there and you knew that he had opened the door, did you not? A. No, I didn't.

Q. Well, you knew that there was a waiter that was there, standing there, you were working with, didn't you?

A. No, sir; I didn't know he were working in the box I were working in, no, in no parts of it.

Q. Well, did you know the other door was open?

A. No, I didn't.

Q. You didn't? May I show the witness his deposition, your Honor?

The Court: Yes.

Q. (By Mr. Welsh): If you will read from your deposition, Mr. Barrett. Incidentally, did you sign the deposition? [57] Yes, you signed it. And

(Testimony of Porter Barrett.)

read from around line 15 or 16 on page 14 through all of page 15.

A. You wish me to read this aloud?

The Court: No. Just read it to yourself.

(The witness examines his typewritten deposition.)

Q. (By Mr. Welsh): Now, have you had a chance to read the two pages I showed you?

A. I didn't read all the last one here. I read half of it.

Q. Will you finish page 15, please.

(Witness examines said deposition.)

Mr. Werner: May I see that, Mr. Welsh?

Mr. Welsh: Oh, yes.

Q. Now, you have read the two pages, have you, sir? A. Yes.

Q. Now, may I ask you again if that doesn't refresh your recollection?

The Court: Counsel, read it aloud. The court or counsel does not know what it is unless you read it aloud. Read it into the record and then ask him whether or not it refreshes his recollection.

Q. (By Mr. Welsh): All right, sir. I will start on page 14:

“Q. Well, just immediately before the accident, Mr. Barrett, did you see him beside you [58] working or looking into that right-hand side of the chill box?

(Testimony of Porter Barrett.)

“A. Shall I use the phrase for that, sir, we call it in serving dinners and any meal, we use the phrase “Up tree.” Everybody is so busy, he’s trying to think of one thing.

“Q. You answer this question, if you can.

“A. I don’t remember.

“Q. I know there are a lot of details in your job. I want to know if you saw him there beside you. He would be roughly on your right-hand side, wouldn’t he? A. That’s right.

“Q. I want to know if you saw him there, sir, just before the door struck your head.

“A. I couldn’t absolutely say it was Al Williams or anyone because there were seven or eight men in the pantry, and I was not looking directly in it, and I didn’t recognize him, that it was him slammed the door at that particular time; it could have been any waiter.

“Q. Did you know that, sir, just before the accident there was a waiter working on the right-hand side of the chill box?

“A. I know the door was open. I don’t know who [59] was working until after the accident and he hollered, ‘Oh, I am sorry’; then I looked up and I saw who it was from a sitting position on the floor.”

Now, up to that point, does that refresh your recollection and do you now remember that when you were looking in the chill box, you knew that the other door was open?

(Testimony of Porter Barrett.)

A. It is possible, sir.

Q. (By Mr. Welsh): This testimony that you gave previously under oath and which you signed, you stand by that, do you not? A. Yes, yes.

Q. (By Mr. Welsh): Yes. Then, later on:

“Q. And you know someone was working at the right-hand side of the chill box, but you didn’t know it was Al Williams until after the accident, is that correct?”

“A. It was possible I knew he was the one that slammed; he admitted he slammed the door on my head.

“Q. You knew there was a waiter there working on the right-hand side but you didn’t know it was Al Williams until after the accident?”

“A. That’s right.”

All right, sir. Now, did you find what you were looking for? You say you were looking in the left-hand side of [60] the chill box?

A. I had opened that door, the lefthand door and were looking into the box, yes, sir.

Q. Are you sure you weren’t over on the right-hand side and that Williams was to the left? Are you sure you don’t have it just turned around?

A. I don’t know; it has been so long. As far as my memory serves me, I were on the lefthand side; as far as my memory serves me.

Q. That is a fair statement. Let us assume your memory to be right; if you were looking in the lefthand side for something, do you remember

(Testimony of Porter Barrett.)

whether or not you found what you were looking for? A. I hadn't found it.

Q. You had not? A. No, sir.

Q. You hadn't found it and so you moved your head over to look in the other side, did you not?

A. I don't remember whether I did or I didn't.

Q. You don't remember whether you turned to cock your head and moved it over to look on the other side? A. No; I don't.

Q. You do not. You always want to be sure and answer, because when your head is jerking it may look like you say "No" when you may not mean to say "No." At any rate, you do remember—would you like a recess? [61]

A. No. You may continue.

Q. At any rate, you do remember that you got a hit in the head, and would you point to where the door hit you? A. (The witness indicates.)

Q. Right on the top of your head, is that it?

A. Yes; about here (indicating).

Q. As it was closed, as Williams closed it, it hit you on the top of the head? A. Yes.

Q. And after you had put some cold towels on it and rested a little bit, you continued to serve that evening meal, did you not, sir?

A. After changing of jackets and things, about a half hour later I continued.

Q. Then you served the next day and so on into Chicago—I mean to Los Angeles? A. Yes.

Q. Now, you kept on the job and you worked

(Testimony of Porter Barrett.)

every shift through from March 11th, on through December 17th, 1955, is that right? A. Yes.

Q. And you went to certain Doctors in Chicago and you went to see those Doctors in the month of April, did you not; the Chicago Doctors?

A. Yes. [62]

Q. And this twitching, that unfortunate thing you have now, started around the latter part of May or the first part of June, 1955? A. Yes.

Q. Then did you see any other Doctors from May through December of '55? A. No.

Q. In other words, you didn't see any Doctor about this twitching until you went to Doctor, was it Goren, in December of 1955?

A. No. I went to Dr. Bernard Jacobs before I visited him.

Q. But that was in December of '55?

A. Yes.

Q. Dr. Jacobs here in Los Angeles?

A. Yes.

Q. There was no unusual lurch of the train at the time this accident occurred, was there, sir?

A. I believe not; no; no.

Q. Had you ever hit your head on that door before, or since? A. No, sir.

Q. What did you do between April and December, did you just work, I mean, you say you didn't see any doctor; did you work between April and December? [63] A. Yes.

Q. Have you been back to work since December of 1955, have you returned to work at all since De-

(Testimony of Porter Barrett.)

cember of 1955? A. No, sir; I haven't.

Q. Well, you have just renewed your leaves of absence, is that correct? A. Yes.

Q. Which maintains your seniority?

A. Yes.

Q. Have you had some rather severe emotional disturbances in your family?

A. No; not lately, no.

Q. Are you able to stop this twitching?

A. I am not.

Q. Sometimes it is not as great as others, is that right?

A. I don't know, sir, because I don't have no control of it; I don't know sometimes whether I am doing it or not doing it, I don't know.

Q. Don't you know when you are doing it and when you are not doing it?

A. I don't pay too much attention to it; no.

Q. Mr. Barrett, were you ever convicted of a felony? A. Yes.

Mr. Welsh: I have nothing further, your [64] Honor.

Redirect Examination

By Mr. Werner:

Q. Mr. Barrett, that conviction was back in 1935, was it not? A. That is right, sir.

Q. Prior to the time that you were employed by the Santa Fe Railway? A. Right.

Q. And it was under the same name that you were employed by the Santa Fe Railway?

(Testimony of Porter Barrett.)

A. Yes.

Q. And you have continued regularly with the Santa Fe Railway from 1946 until the time of this injury?

A. Yes.

Mr. Werner: That is all.

The Court: You may step down.

Mr. Werner: That is our case, your Honor.

(Whereupon, the Plaintiff Rested his Case in Chief.)

[Endorsed]: Filed August 9, 1956. [65]

United States District Court, Southern District
of California, Central Division

No. 19270-WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

Honorable William M. Byrne, Judge Presiding,

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

Attorney for Plaintiff:

ERWIN P. WERNER.

Attorneys for Defendant:

ROBERT W. WALKER,

HENRY M. MOFFAT,

LOUIS M. WELSH. [67]

Monday, September 10, 1956—2:10 P.M.

The Clerk: No. 19270-WB Civil, Porter Barrett vs. Atchison, Topeka and Santa Fe Railway Company, for hearing motion of Defendant for relief from judgment.

Mr. Welsh: Ready for the defendant, your Honor.

Mr. Werner: Ready for the plaintiff. Have you filed this affidavit, Mr. Welsh?

Mr. Welsh: You mean my reply brief?

Mr. Werner: Yes.

Mr. Welsh: Yes, I have.

Mr. Werner: Then I wish to file this photostatic copy of the Pardon.

Mr. Welsh: No objection.

The Court: It may be received. You may proceed.

Mr. Welsh: We have this morning, your Honor, filed a brief of points and authorities in opposition to plaintiff's reply, and at this time I would like to just briefly set forth the basis of this motion.

Federal Rule 60 (b), as your Honor knows, permits relief from the judgment if the judgment is procured by fraud, misrepresentation, or other misconduct on the part of an adverse party and for any other reason justifying relief.

After this action was over, I personally became somewhat suspicious, and I asked that some undercover surveillance be conducted regarding Mr. Porter Barrett, [69] as a result of which motion pictures, among other things, were taken.

Primarily, the basis of this motion is based upon what your Honor was able to observe at the time of the trial and what we will show by way of motion pictures, together, of course, with the affidavits of the persons who took those motion pictures.

As your Honor will recall, when this case was tried, Mr. Barrett twitched his neck constantly during all proceedings, whether he was on the witness stand, at counsel table, out in the hall, or elsewhere in or around the courtroom. The deposition revealed that at the time his deposition was taken, he twitched quite in the same way as he did in this Court before the Judge and Jury.

When he was asked on the witness stand about this twitching and whether it had always been the same, he said he didn't pay much attention to it and that as far as he knew, it was the same.

Now, he has recently filed an affidavit in which he said that what he meant to say was that he is sometimes free from it, from one to four hours.

Now, the record in this case is pretty clear. Of course, the record is transcribed and subsequently, I would like to go into that in more detail, because I believe that from what plaintiff has said in his own affidavit and taking [70] his own case, you have a situation presented to the Court where at least

it can be said that there was a gross exaggeration, and upon that gross exaggeration, a verdict for \$12,500.00 was brought in.

Now, the Federal Courts have held that on a motion of this sort, the court has plenary power, it can either vacate the judgment entirely or it can remit, it can direct the plaintiff to accept a certain amount, else have the judgment vacated.

As far as I personally am concerned, I would be willing to stipulate to a new trial on the case, if that were the Court's desire after it considers all the evidence we have to present.

If the Court please, at this time I would like to have permission to show the motion pictures which are referred to in the affidavits that have previously been filed. May we do that, sir?

The Court: Yes.

Mr. Welsh: First, if I may, I would like to introduce the film in evidence as exhibits, so that after the file has been completed, we can identify them.

Mr. Werner: Mr. Welsh, I have one suggestion: Don't you think that we should have, and I don't know whether it will bring about anything, the man on the stand stating the circumstances under which he took the pictures? It is merely [71] a suggestion, your Honor.

Mr. Welsh: I don't care.

Mr. Werner: I don't know where these were taken or under what circumstances, and the man taking them is the only one that could tell us.

Otherwise we are cut off from any sort of cross-Examination in respect to that matter.

The Court: Well, of course, he can put on his own case. That all goes to the weight.

Mr. Welsh: I will be happy to lay a foundation.

The Court: He can put it on the way he wishes to.

Mr. Welsh: I will be happy to lay a foundation for these films. Is that what you are concerned with, whether these are the films?

Mr. Werner: Oh, no. I am positive that they are the films that you took of the plaintiff, but I would like to know whether he took other films or whether these are all of them.

Mr. Welsh: All right.

Mr. Werner: And under what circumstances. I have no objection to showing the films at all.

Mr. Welsh: Very well.

Mr. Werner: And I don't know whether they will bring out anything, your Honor. I just think the court should have everything before it, is all.

The Court: Of course, the Court will have whatever [72] Counsel presents. In other words, it goes to the weight. I don't know what he is going to put on there. He may put something on that is not at all convincing to me.

Mr. Werner: All right.

The Court: And he might put on something, and I might sit here and say if you put on such and so or change these figures, it will be more convincing but that is not for me to do. I don't put this case on. All I do is judge it.

Mr. Werner: All right, sir.

The Court: It is for counsel to put on what he wishes.

Mr. Werner: Maybe I am anticipating and that it is imaginary.

Mr. Welsh: I can do as you suggest.

Mr. Werner: All right.

Mr. Welsh: May I proceed, sir?

Mr. Werner: I just felt there was something lacking unless he did. But it is all right. With the Court's statement, I withdraw it, and just go ahead.

Mr. Welsh: May I ask Mr. Richcreek to take the stand. May he?

The Court: Yes.

GEORGE F. RICHCREEK

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Give us your full name. [73]

A. George F. Richcreek.

Direct Examination

By Mr. Welsh:

Q. Mr. Richcreek, are you the same Mr. Richcreek who has signed an affidavit which is on file in this matter? A. Yes, sir.

Q. And are you the Mr. Richcreek who took some of the motion pictures referred to in that affidavit? A. Yes, sir.

Q. Now, did you take all of those motion pictures referred to in that affidavit?

(Testimony of George F. Richcreek.)

A. I took all the motion pictures referred to in the affidavit that I signed, yes, sir.

Q. That is what I referred to. Did you bring those very same films here with you today?

A. Yes, sir; I did.

Q. Did you take any other photographs, other than those? A. No, sir; I did not.

Q. Would you please let me have the films that you took. Thank you. Now, you have handed me three packages, little boxes, of Eastman 16mm. Magazine film. Are those all the films that you took or were taken in your presence or under your supervision? A. Yes, sir; they are. [74]

Q. Are these in any particular order, 1, 2, and 3?

A. Yes, sir; they are.

Mr. Welsh: I would like to introduce these three rolls of film, your Honor, into evidence, as Defendant's Exhibits Nos. 1, 2, and 3, or however the Court desires to designate them.

The Court: Very well. They will be received. Do you want them marked as three different exhibits?

Mr. Welsh: If the Court thinks it more convenient that way I don't have any preference, sir. They can be one, as far as I am concerned.

The Court: Well, it depends on what reference you want to make to them later.

Mr. Welsh: Perhaps it would simplify it, if we make them Nos. 1, 2, and 3, sir.

The Court: Very well.

(Testimony of George F. Richcreek.)

(Said three packages of film were marked as Defendant's Exhibits Nos. 1, 2, and 3, and received in evidence.)

Mr. Welsh: You may cross-examine.

Cross-Examination

By Mr. Werner:

Q. Mr. Richcreek, did you have an associate that assisted you in taking these pictures or in keeping Mr. Barrett under surveillance? [75]

A. Yes, sir; I did.

Q. And what is his name?

A. His name is Francis Watson.

Q. Francis Watson? A. Right.

Q. What was the first day that you kept him under surveillance?

A. The first day that I kept Mr. Barrett under surveillance was May 28th, 1956.

Q. May 28th? A. Yes, sir.

Q. And at what point did you first have him under surveillance, the address, the location is what I have in mind?

A. It was at 2929 Van Buren Place in Los Angeles.

Q. And is that the home of Mr. Barrett?

A. I believe it was at that time.

Q. And for how long did you have him under surveillance from the time you started on May 28th?

(Testimony of George F. Richcreek.)

A. I had Mr. Barrett under surveillance for approximately six hours, five to six hours.

Q. And that is on that day? A. Yes, sir.

Q. Did you have him under surveillance the next day? A. No, sir. [76]

Q. When was the next date that you had him under surveillance?

A. I did not have him under surveillance at any other dates.

Q. That is the only date that you had him under surveillance?

A. Yes. I assisted in a surveillance at a later date, but I was not the——

Q. Well, all right. Then, in order that we may have it complete, when was the next date that you either had him under surveillance or assisted in having him——

A. I don't recall the exact date, sir. I would have to consult——

Q. You may refer to any notebook you have or any data. I am just trying to get information.

A. Well, I don't have the information at my finger tips, or I would gladly give it to you. I would have to consult some records to ascertain exactly what the date was, or the affidavit.

Mr. Welsh: May I show him this?

Mr. Werner: Surely, surely. He may look at anything that will refresh his memory.

(Mr. Welsh hands papers to the witness.)

A. On June 26, 1956.

(Testimony of George F. Richcreek.)

Q. (By Mr. Werner): June 26th? [77]

A. Right.

Q. 1956, and was Mr. Watson with you at that time? A. No, sir. He was not.

Q. Who was with you at that time?

A. Mr. Elliott.

Q. And was he the man in charge of the surveillance? A. On the second day, yes, he was.

Q. Well, I am talking about June 26th?

A. Yes, on June 26th, he was.

Q. What is his name? A. Joe Elliott.

Q. And you assisted Joe on that occasion, and what was the location from which you began your surveillance? A. On June 26th?

Q. Yes.

A. The 3100 block on Van Buren Place.

Q. And how long did you have Mr. Barrett under surveillance at that time?

A. I assisted Mr. Elliott that day for approximately—while he had Mr. Barrett under surveillance, for approximately four hours.

Q. Do you know whether Mr. Elliott was there any longer than you were at that time?

A. Yes, sir; he was.

Q. He remained on? [78] A. Yes, sir.

Q. And then, what was the next date?

A. I had never again taken up surveillance on Mr. Barrett.

Q. I see. Then, the only two times that you

(Testimony of George F. Richcreek.)

were interested in having him under surveillance was on the 28th day of May and on that June 26th?

A. Right.

Q. All right, sir. We will go right back to May 28th. When did you first observe Mr. Barrett?

A. I observed him at about 11:00 a.m.

Q. At 11:00 a.m., was he by himself?

A. Yes, sir; he was.

Q. And what was he doing at that time?

A. He was driving his automobile.

Q. And where were you?

A. I was in my automobile.

Q. Then, how long did you keep him under surveillance?

A. For approximately five or six hours.

Q. Well, I know, but where did he go in his automobile? A. The first place he went to?

Q. Yes.

A. He went to a market in the 1500 block on Jefferson Boulevard, that is West Jefferson Boulevard. [79]

Q. When did you first start to take any pictures of him? A. At that time.

Q. In the market?

A. No, sir. As he left the market and returned to his automobile.

Q. How near did you get to Mr. Barrett on this occasion? A. On that particular occasion?

Q. Yes.

A. I would estimate that I was approximately 75 to 100 feet away from Mr. Barrett.

Q. That was an average distance at all times?

(Testimony of George F. Richcreek.)

A. Yes, about that, that is an approximate average, yes.

Q. You are just giving your best estimate, Mr. Richcreek? A. That is right, that is right.

Q. And sometimes it was a little less and sometimes a little more, isn't that correct, it was approximately 75 or 100 feet? A. Right.

Q. Now, did you take any pictures while he was in his automobile? A. Yes, I did. [80]

Q. And while he was driving?

A. Yes, I did.

Q. What kind of an automobile was he in?

A. He was in a 1949 Mercury.

The Court: May I suggest this. You can do it if you want to, but it seems to me that you would be in better position to cross-examine him after you have seen the pictures. You are asking a lot of these questions that will be disclosed.

Mr. Werner: All right.

The Court: You can do what you want, but if I were cross-examining him, I would want to look at the pictures first and then question him.

Mr. Werner: Well, I think maybe I would. I don't know any more about the pictures. I will just reserve cross-examination.

The Court: You can just remain there, Mr. Richcreek. It may be that during the showing of the pictures there will be some questions they will want to ask during the operation.

Mr. Welsh: If your Honor please, I was going to have Mr. Richcreek operate it.

(Testimony of George F. Richcreek.)

The Court: He can testify from down there. If you have any questions, you can stop it.

Mr. Welsh: And then he can resume the stand again, [81] your Honor, which is the only reason for it.

The Court: Well, Mr. Richcreek understands that while even he sits at the counsel table operating the machine, if you are asked a question while you are there, it is just the same as if you were on the stand.

The Witness: Yes, sir.

The Court: In other words, you are under oath and you are testifying, and it may be that I may want to ask a question. It may be that during the course of the showing of the picture, some questions may be asked.

Mr. Welsh: If your Honor please, I would like to put Mr. Elliott on and lay the foundation for that and then show both pictures.

The Court: Now, as I understand it, these three pictures that have been presented here now were pictures that were taken by Mr. Richcreek.

Mr. Welsh: That is correct.

The Court: And you have some more pictures that were taken?

Mr. Welsh: By Mr. Elliott.

The Court: Well, don't you think we better dispose of this first?

Mr. Welsh: Very well.

The Court: It seems to me the way you have

(Testimony of George F. Richcreek.)

that rigged up—have you tried that on that [82] screen?

Mr. Welsh: Yes. The light just touches the corners. Can your Honor see the screen the way it is?

The Court: Yes, I can see it.

Mr. Welsh: I think you can come over here, Mr. Werner.

Mr. Werner: Just so I see the screen here. I think that probably is a little better.

(The courtroom was darkened and a motion picture film was shown on screen before the Court.)

The Court: Is that the defendant?

Mr. Welsh: That is the plaintiff, yes, sir.

The Court: Rather, the plaintiff?

Mr. Welsh: Yes.

Mr. Werner: What is this location?

A. This is in the 1500 block on West Jefferson Boulevard.

Mr. Werner: Is this where you got to the point where you said he was shopping?

A. That is right. He went in the market and came out.

Q. He did not have any other business there?

A. I didn't see any.

Mr. Werner: That is all right.

The Witness: May I have the light, please?

(The courtroom was again lighted.)

(Testimony of George F. Richcreek.)

Mr. Welsh: I would like to say, your Honor, that if [83] they are not too distinct from where you are sitting, we could bring the screen closer, because you can see in detail if you are close enough to them.

The Court: Well, I assumed that you fixed it up there in a manner that we will get the best view of it.

Mr. Welsh: Well, we fixed it up in the manner in which the Bailiff told us to. I would personally prefer that the screen be closer.

The Court: Make it closer, then.

Mr. Werner: Well, I want it put where it will be the most distinct, because I expect to have something to say about that.

Mr. Welsh: Well, it was a little far away from where he was sitting.

Mr. Werner: Well, get it closer. I agree with the Court that they should be put in the most advantageous position that you can find.

Mr. Welsh: Well, I would like to have them as close to the Bench as possible.

The Witness: That will give you a smaller picture.

Mr. Welsh: I want to get the picture closer to the Judge.

Mr. Werner: I don't know as that will make it more distinct. That is the thing.

The Court: I have one of these 16 millimeter machines. [84] I haven't used it for some time, but I have always found that if you get a larger

(Testimony of George F. Richcreek.)

picture, you get it away at a greater distance, but it is not as distinct.

Mr. Welsh: Yes, sir.

The Court: And then, of course, sometimes you get it in closer, but there is always a point where you get a good sized picture and a good distinct picture.

Mr. Welsh: Yes, sir.

The Court: I thought that is what you folks were doing out here, while I was in chambers, that you were arranging it where you could get the most distinct and clearest pictures.

Mr. Werner: I thought they were.

Mr. Welsh: No. Do you think it would be clearer if we moved the machine down here?

The Witness: We can move the screen down here and see. It would be easier to move.

The Court: Move the screen down here, then. That is why I asked you the question to start with, because it seems to me that is a long distance for a 16 millimeter projector.

Mr. Welsh: Yes, sir.

The Court: Now, the probability is that you will have a little smaller picture, but a more distinct picture.

Mr. Welsh: Yes, that is what I would like to have.

The Court: Are you going to run the same one over [85] again?

The Witness: No, I wasn't going to.

(Testimony of George F. Richcreek.)

The Court: I think perhaps you better. Do you have another one in there?

The Witness: Yes, sir.

The Court: Well, use that one and then run the other one afterwards.

(The courtroom was darkened and one of said motion pictures films was shown on the screen before the court.)

The Court: Where is this?

A. This is on, I believe it is, East 33rd Street.

The Court: You can make any comment you care to, if you want to describe the picture or anything about it.

The Witness: This is the 300 block on East 33rd Street.

Q. (By Mr. Werner): Is that the plaintiff there? A. Yes, it is.

May I have the lights, please?

(The courtroom was again lighted.)

Mr. Welsh: Mr. Richcreek, if you will play the first one over again. I think this is more distinct.

Mr. Werner: I think it is more distinct.

The Witness: Well, on the first picture, there wasn't as much sun; there was a little——

Mr. Welsh: Well, play it over there and see if there [86] is any difference in it now.

The Court: Is there fifty feet of film in each one of those rolls? A. Yes, your Honor.

Mr. Werner: Well, that last one didn't have?

(Testimony of George F. Richcreek.)

A. It wasn't completely exposed.

Mr. Werner: It wasn't completely. Was the first one?

A. Almost. There were probably five or between five and ten feet at the end of the roll that wasn't exposed.

(The courtroom was again darkened.)

Mr. Welsh: Now, you are replacing the first roll?

A. This is the first roll.

(Said motion picture film was again shown on the screen before the Court.)

(The courtroom was again lighted.)

Q. (By Mr. Welsh): Now, you have shown Defendant's Exhibits Nos. 1 and 2 and you are now about to show Defendant's Exhibit No. 3; is that correct?

A. Yes, sir.

Q. (By Mr. Werner): And where is the locale of this, Mr. Richcreek?

A. These pictures were taken near Sixth and Bixel, Los Angeles.

Mr. Welsh: I can be more specific about the exact location. [87]

Mr. Werner: Well, I know just exactly where that is.

(The courtroom was again darkened and said motion picture film was shown on the screen before the Court.)

Q. (By Mr. Werner): Is that the plaintiff there?

(Testimony of George F. Richcreek.)

A. Yes, sir; that is the plaintiff, without the hat on.

Q. (By Mr. Welsh): In the black coat?

A. Yes, sir.

Q. And he is twitching in that, is he?

A. Yes, sir; he was moving his head quite a bit.

Mr. Werner: Well, I couldn't see it——

The Witness: I believe it is more noticeable with the hat on him.

(The operation of the projection machine was stopped and the courtroom again lighted.)

Q. (By Mr. Werner): Were those all you participated in, Mr. Richcreek?

A. Yes, sir. These are all the pictures that I took.

The Court: Was he twitching his head all during that?

A. During this last roll, yes, sir; he was.

The Court: All the time?

A. Yes, sir.

Mr. Welsh: Now, I would like to call Mr. Elliott, if I may, your Honor.

Mr. Werner: Will you tell us, that third one was on [88] West Sixth Street, wasn't it, Mr. Richcreek?

A. Yes, sir; West Sixth and Bixel.

Mr. Werner: And Bixel.

JOE W. ELLIOTT

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Give us your full name.

A. Joe W. Elliott.

Mr. Welsh: If I may, your Honor, I would like to give Mr. Elliott a copy of his affidavit.

The Witness: I have my original notes.

Direct Examination

By Mr. Welsh:

Q. You do? A. Yes.

Q. Did you take motion pictures of the plaintiff, Porter Barrett, Mr. Elliott? A. I did.

Q. On what day or days did you take those pictures?

A. On June 25, 1956, and the following day, June 26, 1956.

Q. On June 25th were you accompanied by anyone? A. On June 25th, no, I was not.

Q. And on June 26th, were you accompanied by anyone?

A. For several hours on June 26th, I was accompanied by Mr. Richcreek, for purposes of positive identification. [89]

Q. You did take certain motion pictures yourself. Did you bring those motion pictures with you?

A. Yes, I did. I have them here.

Q. Did you bring all of them?

(Testimony of Joe W. Elliott.)

A. All of them, yes.

Q. May I have them, please. I notice that you have given to me four boxes apparently containing Eastman Kodak Motion Picture Film numbered 1, 2, 3, and 4. Do the numbers on the boxes indicate the order in which they were taken?

A. That is correct.

Mr. Welsh: If I may, your Honor, I would like to introduce these in evidence as Defendant's Exhibits 4, 5, 6, and 7.

The Court: Very well. They will be received.

(Said four packages of Motion picture film were received in evidence and marked as Defendant's Exhibits Nos. 4, 5, 6, and 7.)

Mr. Welsh: You may cross-examine.

Cross-Examination

By Mr. Werner:

Q. Mr. Elliott, is that the name?

A. That is correct.

Q. Did you take pictures at all times that you had Mr. Barrett under surveillance?

A. Absolutely. I took every foot of motion pictures [90] I could get.

Q. And on the 25th, what was the locale of that?

A. Of the first motion pictures?

Q. Yes.

A. In the 700 block on South Mateo.

Q. And what was the next time? The 26th.

A. Did you say the 25th?

(Testimony of Joe W. Elliott.)

Q. Well, the 25th was in the 700 block of South Mateo, is that right?

A. That is correct. Well, there was one sequence—there were additional sequences there, the same day, the man did a lot of driving around town.

Q. All right, but you took them while his car was moving?

A. Well, shortly after his car started to move. Of course, you cannot wait until he is driving out of sight. You let him drive a few feet, and that is all I could get of him moving.

Mr. Werner: Well, I think I will reserve any questions until after you have shown the pictures.

The Witness: All right.

Mr. Werner: When you said there were different sequences——

The Witness: Yes, that is right. [91]

Direct Examination
(Continued)

By Mr. Welsh:

Q. You are about to show these Defendant's Exhibits 4, 5, 6, and 7, in that order, is that correct?

A. That is correct.

Q. Pardon me, if I may bring this just a trifle closer, your Honor.

The Witness: All right.

(The courtroom was darkened and motion picture film was shown to the Court.)

(Testimony of Joe W. Elliott.)

Q. (By Mr. Welsh): There is the plaintiff?

A. There is the plaintiff. He is sitting in the driver's seat of that automobile. He is reading something.

He is wearing a straw cap with a visor.

Mr. Werner: Anyone else in the car with him?

A. There is someone else in the car with him, yes.

Q. (By Mr. Werner): Male or female?

A. I believe it was a female next to him.

A man just entered the car, and is sitting there in the extreme right side of the front seat now.

Q. Then, there were three in it?

A. Three at this point.

Q. Yes.

A. There were only two at the beginning of the sequence. [92]

Q. All right.

A. The plaintiff is on the right.

Q. Is this on South Mateo?

A. Here is an identification, right there, Adams Boulevard and 1800 West. That is the plaintiff there walking into that liquor store.

In this case, the plaintiff was on the near side, nearest to us.

That is the plaintiff entering the car.

(The operation of the motion picture projection machine was stopped and the courtroom again lighted.)

(Testimony of Joe W. Elliott.)

Cross-Examination

By Mr. Werner:

Q. What period of time does this film cover?

A. What period of time?

Q. Yes.

A. In what respect? There are sixteen frames per second.

Q. Then, I should think you would know pretty well how long it takes to take it. How many frames did you take?

Mr. Welsh: Wait a minute. Did you mean how much time does it take to expose that much film?

Mr. Werner: I guess that is what I want to ask.

Q. How much time would it take to expose the amount of film that you displayed here? [93]

A. Roughly two minutes.

Q. Roughly two minutes?

A. Yes, but of course, the two minutes is focus and is several sequences.

Q. Well, I want to ask that about the other pictures, and we will get back to that later. Then, this entire film here covered two minutes?

A. Two minutes showing time and two minutes actual running of the camera; but over the period from the first sequence to the last sequence upon this particular magazine of film, I can give you the exact time if you would like.

Q. Yes, I would.

(Testimony of Joe W. Elliott.)

A. The first 25 feet were taken at 3:11 p.m. The next 13 feet were taken at 3:35 p.m.

Q. All right. Just a minute. You took the first picture at 3:11? A. Yes.

Q. And when did you conclude it?

A. Well, I began it there. I had my hands full. I was pretty busy. I could not check my watch from the time of starting.

Q. All right. I just want a rough estimate as to how much time that amount of film run.

A. 25 feet run approximately one minute.

Q. All right. And this covered about two minutes? [94] A. Approximately.

Mr. Werner: All right.

Mr. Welsh: I might say, Mr. Werner, that the affidavit indicates the times at which these pictures were taken, each one.

Mr. Werner: Yes, it indicates the time, but not the duration of time.

Mr. Welsh: Not the running time, that is right.

Mr. Werner: That is all I am trying to prove, Mr. Welsh.

The Witness: It is at 16 frames per second, and there are 40 frames to the foot.

Mr. Werner: Well, I will let you figure the time, if you will.

A. Counsel, it is very difficult to say exactly the time I started and finished.

Mr. Werner: Well, you are just asked for your estimate, and I asked for some fairly accurate hypothesis of this thing.

(Testimony of Joe W. Elliott.)

Direct Examination

(Continued)

By Mr. Welsh:

Q. Now, you are about to show Defendant's Exhibit No. 5, are you? A. That is correct.

Because of the plaintiff being of a dark complexion, I purposely over-exposed these films so we could establish [95] his positive identification.

Mr. Welsh: You just show the pictures and answer the questions.

The Witness: All right.

Mr. Welsh: Go ahead.

(The courtroom was darkened and said motion picture film was shown to the Court.)

Q. (By Mr. Welsh): That is the plaintiff?

A. That is the plaintiff, that is correct.

Q. (By Mr. Werner): With some object in his hand? A. That is right.

Q. (By Mr. Welsh): Which one of those, if any, is the plaintiff? A. On the left.

(The witness stopped the operation of the motion picture projection machine, and the courtroom was relighted.)

(Testimony of J  e W. Elliott.)

Cross-Examination

By Mr. Werner:

Q. How long a period did that cover, Mr. Elliott? About two minutes?

A. I would say it covered approximately a minute and a half.

Q. A minute and a half?

A. Approximately, yes.

Q. What was the location of that, and the date? [96]

A. I will check my notes, now, and give it to you.

Mr. Werner: That is fine. First, the date?

A. That was June 26th, at Broadway and Washington Boulevard.

Q. Broadway and Washington Boulevard?

A. Yes, sir.

Mr. Werner: All right. Thank you.

Direct Examination

(Continued)

By Mr. Welsh:

(The courtroom was again darkened and motion picture film shown to the Court.)

Q. Which is the plaintiff, if any?

A. The plaintiff is hitching up his trousers here in the center of the screen.

Q. Is that the plaintiff smoking a cigarette?

A. On the right.

(The witness stopped the operation of the motion picture projection machine.)

(Testimony of Joe W. Elliott.)

Cross-Examination

By Mr. Werner:

Q. How many minutes was that under exposure?

A. Approximately a minute and a half, a minute and forty seconds. [97]

Direct Examination

(Continued)

By Mr. Welsh:

Q. This is the last one, and it is Defendant's Exhibit No. 7? A. Yes.

(Said motion picture film was shown to the Court.)

Cross-Examination

By Mr. Werner:

Q. And what date was this, Mr. Elliott?

A. The same date, June 26th.

Q. The 26th, and where?

A. I will have to check the location.

Q. All right.

A. I believe it is South Main Street.

Mr. Welsh: That is the plaintiff with the visor cap, is it?

A. That is right. The plaintiff is on his right; he just took his cap off.

And he is on the left.

(The witness stopped the operation of the motion picture projection machine.)

(Testimony of Joe W. Elliott.)

Q. (By Mr. Werner): How long was that?

A. Approximately 30 or 40 seconds.

Q. And is that also on June 26th?

A. Yes, it was. [98]

Q. And where, Mr. Elliott?

A. South Main Street, the 1000 block South Main Street.

Mr. Welsh: Do you desire to further question this witness?

Mr. Werner: No. I think I have asked him everything I care to.

Mr. Welsh: Mr. Elliott, would you take the stand for just a moment.

(The witness returned to the witness chair.)

Redirect Examination

By Mr. Welsh:

Q. During the two days over which you took these pictures that you showed, were you making an effort to keep from being observed by the plaintiff? A. Oh, yes, I was.

Q. And did you see Mr. Barrett on any occasions other than those which you photographed?

A. Possibly, but it was only while I was trying to take pictures of him; in other words, we tried to get as many pictures as possible.

Mr. Welsh: I see. All right. I have nothing further. Thank you.

Mr. Werner: I have no cross-examination.

Mr. Welsh: Now, your Honor, basically our mo-

tion is [99] based upon the misrepresentation of the plaintiff in that in his case, which was tried before this Court, he not only twitched constantly, but he testified to the effect that it had been worse ever since the 1st of June, 1955.

We also point out in our memorandum of points and authorities and our affidavits disclose the income interest of Dr. Darrington Weaver. Now, that is background. That in itself spells nothing, but coupled with the other factors that we believe now have been admitted by plaintiff's own affidavits, it indicates at least a gross exaggeration.

I would like to particularly point out this: in plaintiff's nine affidavits and brief that were filed in opposition to our motion, not one single fact that we set forth did he deny. The only denial was that Dr. Weaver said that he had not in fact talked with me on the telephone or otherwise.

But Porter Barrett did not deny that he had been observed in a normal condition by these three people who filed affidavits, two of whom are in Court here today. He did not deny that when he came to my office, that he had twitched his neck constantly, and just as he did in Court, but when he departed and went down the corridor, as I have indicated in my affidavit, I opened the door of my office after he got in the corridor and observed him, and he did not deny in his affidavit that as he stood waiting for the [100] elevator, he was perfectly normal, although just a few minutes before that, he was twitching and contorting with the same constant frequency as he did in this courtroom.

In addition to that, plaintiff has made certain statements which indicate he is quite capable of being precise if he cares to do so. When he was testifying in this case, page 35 of the transcript, the original of which is on file, your Honor, there is this question from plaintiff's own counsel:

"Q. Now, when was the first time—I notice the jerking of your neck—when did you first notice this jerking of your neck and head?

"A. Oh, the last of May or the first of June, somewhere along in there, I believe it was."

Now, as your Honor will recall, he saw doctors in Chicago up to the last of May. None of those doctors reported a jerk. He said himself he did not jerk, and then it started in the first of June and that continued until December, 1955. Between June and December, he saw no physicians, but on December 17th he saw Dr. Darrington Weaver, and then he quit his work.

"Q. And has that continued since that date?

"A. Yes.

"Q. And has it improved, gotten better or worse?

"A. No; it hasn't." [101]

Now, on cross-examination in this courtroom, I said to him:

"Q. Are you able to stop this twitching?"

He said, "I am not."

I asked, "Sometimes it is not as great as others, is that right?"

I gave him the opportunity.

He said, "I don't know, sir, because I don't have

no control of it; I don't know sometimes whether I am doing it or not doing it, I don't know."

Now, I ask that the Court compare this answer with the statement in his affidavit where he states that he is free from jerking from between one to four hours.

Now, the next question was:

"Don't you know when you are doing it and when you are not doing it?"

"A. I don't pay too much attention to it; no."

Yet, now, he files an affidavit in which he says he is free from jerking from one to four hours.

Now, I realize that this is a serious charge that I bring, but the law and the Federal Rules do not require that we prove fraud only. It is fraud, misrepresentation, or other misconduct, and any other act of the plaintiff which would justify the defendant being relieved from the judgment, or it could be the other way around. The plaintiff could [102] make a motion if the defendant were guilty of misconduct.

It is interesting to note that the affidavits that they filed of the seven employees of the railroad do not in any way contradict anything that we have put in here either, nor do they add anything to their case. Three of the affiants in those affidavits state that they had observed him jerking during the past several months. Well, I have observed him jerking during the past several months, too, and we don't contend that he wasn't jerking during the past several months. The question is whether or not he misrepresented the true statement of his condition at the time of this trial.

In another affidavit plaintiff files, the affiant says he has known him for ten years and has lived in the same neighborhood. All he can say is that he has observed him during the past several months. Now, let's see. Yes, "during the past several months I have observed him intermittently jerking his head."

So that those affidavits do not add anything to the issue which we have presented to this Court.

Now, I particularly rely on the case of *Rice vs. Rice*, which is a California case.

Rule 60(b) was taken directly from Section 473, that is, it was based upon Section 473 of the Code of Civil Procedure and the Federal Rules revisors' notes so [103] indicate. The cases have held that because of that the State authorities, insofar as they pertain to Section 473, are appropriate in connection with Rule 60(b). We have cited cases, and we have cited a section of Moore's Commentary which brings that out.

The case of *Rice vs. Rice* was based on Section 473, and I particularly call the Court's attention to that, for this reason: In that case, which was a divorce action, the husband had testified in such a manner as to imply that he was still the owner of certain property which he had been owner of. He didn't say he owned it. On the contrary, when he was asked the direct question whether it was in his name, or something to that effect, he said, "No," but, by reading what the Court has to state, it is obvious that the whole tenor of his testimony was calculated to mislead. I have discussed that on page 9 of our opening brief. Even in that case, the Court

said that this was a fraud on the Court and the judgment was set aside because he should have disclosed the fact that he had gotten rid of this particular piece of property, although he made no misstatement at all.

The answer that this Court will give to our motion is based more upon philosophy of what should be done in situations like this rather than technical rules. [104]

There was a time when we had the very strong doctrine of caveat emptor covering the marketing of products so that every commercial transaction could not be upset just because some poor dupe was taken advantage of. And, as the Court knows, over the past 20 years, that doctrine has been almost completely dead and under the Federal Trade Regulations, if a company advertises in a way to mislead the gullible public, it can be struck down and punished under the Federal law.

Again, there has also been a doctrine of law that Civil judgments should not be set aside, but again the doctrine expressed in the Federal Rules of Procedure and the application of them by the Federal Courts has been such as not to tolerate misrepresentation to a gullible jury or whoever it might be. Even if they weren't gullible, I think sophisticated people would have been disillusioned by this situation, and certainly a court of justice, the highest courts—that is, the highest tier of courts in this land, the United States courts—should not be misled by gross exaggeration just because we know it is done, any more than it is right for a cigarette

company to do this because everybody does it. If they don't permit them to do it in that field, certainly they shouldn't permit them to do it in a court of justice.

In trying to view this case not as an advocate, but in making an attempt to see it objectively, I can see that there would be sufficient basis for the jury to have found [105] the railroad company negligent in this case. We contested that issue, but there is no question but that there was ample evidence to support a verdict of negligence, assuming that there probably would be some evidence of some damage.

There are cases that hold where the party has committed some fraud or misrepresentation, the Court will not dissect and try to determine how much of the verdict was due to misrepresentation and how much was due to the actual tort, but the cases hold, and we cite a United States Supreme Court case for the proposition, that the whole judgment will fall if it is in any way tainted with chicanery.

However, this Court has in its discretion to do justice in this matter, and it seems to me at least, the least can be said is that a judgment for this amount, which was based upon a set of facts that even the plaintiff now admits is not true, he says it is no longer true, a judgment based upon that type of thing where he admits or admits through failure to deny that he walked into my office jerking constantly, just as he did in this courtroom, and that he walked out of there, and while he was waiting for the elevator, I saw his neck just as straight as

though nothing were the matter with it, it doesn't seem to me to be justice that a verdict based upon that type of evidence should be permitted to stand.

Thank you.

Mr. Werner: May it please the Honorable Court: [106]

I attempted to digest and read the Rice case thoroughly, but I could find no application of the facts there to the one here at Bar.

As I remember the facts in the Rice case, at the conclusion of the trial, both the attorney for the plaintiff, I think it was, and the plaintiff himself, had knowledge of the fact that the plaintiff had title to the property in the plaintiff's name, and at the conclusion of the trial, the Court intimated that he was going to give judgment based upon the fact that the plaintiff had title in his own name, and at that time the counsel for the plaintiff and the plaintiff knew that he had already transferred the property to some other person, and, of course, there wasn't anything else the Court could have done, under the circumstances, but hold that that was a reprehensible act on the part of both the plaintiff and counsel, and he did not exclude counsel for the plaintiff in that action at all.

Now, here, the portion of the Rule, if any, that has application to our case, and upon which the defendant must rely is the one that the judgment was obtained by fraud, and there isn't any question but what the Rule is that fraud must be proved by clear and convincing evidence. I only cite one Federal

case to that effect, but there is no other rule to the contrary.

And let us examine the facts in the case and find out [107] where the fraud is, if any, and that would have had to have been some fraud perpetrated prior to the time of the trial or at the time of the trial itself.

The only assistance, as I view the evidence of those pictures or the affidavits of these gentlemen who had the plaintiff under surveillance, would be for the Court to draw an inference to the effect that this injury did not exist and that, therefore, a fraud had been perpetrated upon the Court and the jury. Otherwise, it has no place here.

And there is no opposition, and Mr. Welsh doesn't contend there is, to the effect that where an issue could have been put before the Court and the jury at the time of the trial, it should have been done. These things shouldn't be tried piecemeal, or the defendant should not wait until after the trial and then upon a motion of this kind attempt to try it again under the same facts.

And I contend, your Honor, that there have been no additional facts.

And in respect to being more definite on the part of the plaintiff in this action, he was under the control of the counsel in the case at the time he was being examined. May I have the transcript of plaintiff's testimony that was written, page 64?

Mr. Welsh: Here, you can have my copy.

Mr. Werner: I will take yours. This is bound in. [108]

I think Mr. Welsh read all of the evidence with respect to the direct examination, but before coming to Court, I read the only cross-examination I could find, and part of that, and I know that Mr. Welsh would have read it all, had he thought it had any materiality, and here is the only cross-examination in respect to the matter of a twitching:

“Q. Are you able to stop this twitching?”

“A. I am not.”

And I think that is the inference to be drawn from the doctor’s testimony that it isn’t a voluntary thing; it is done, and it is beyond the control of the plaintiff as to whenever it does occur. But there is nothing said there as to the period, the duration of the periods over which this twitching extended, so we can start out with that he didn’t twitch all night and he never intended to state that he did.

A further question:

“Q. Sometimes it is not as great as others, is that right?”

“A. I don’t know, sir, because I don’t have no control of it; I don’t know sometimes whether I am doing it or not doing it, I don’t know.”

And let me interpolate there to say that is why it is impossible for this plaintiff to state positively and honestly whether at a particular time covering a minute or a minute and a half during a day, or on any particular day that he did or did not twitch at that time; it would be impossible. [109] Therefore, he could not say as a patent matter of fact, based upon his memory, whether during that minute or minute and a half, and to which his atten-

tion was not called, and he had no reason for recalling it, because he did not know whether he was being under observation or not; he would have to say that he didn't know, because his doctor will state and he will state that it isn't a continuous performance.

Mr. Welsh brought out very clearly at the time of the trial in the cross-examination of the doctor that that torticollis was either due to a lesion of the brain or to an emotional impetus, and the lesion of the brain was eliminated, so it was the emotional thing entirely, and that during times of stress, particularly appearing before this Court, particularly where a layman appears before this Court, certainly he is under greater stress, he would jerk constantly; he would have the same doctor and in the event that he were to appear again, it would be just as strained and just as intense as it was during the trial that we had here during the month of May. It is a matter that is beyond his control.

When trials are over and the litigation subsides and those matters of discretion are cast aside, of course, the strain is less, but he still has the torticollis during periods that he cannot designate with any great accuracy. He could probably pinpoint it a great deal better if he were interrogated more closely by counsel, but during the time of [110] trial apparently it was the object of the counsel in trying the case, and it was tried very well, not to place too much stress upon the injuries for fear that it might enhance the verdict, and that is why probably they did not put the doctor on the stand who examined

this plaintiff, and more than likely the plaintiff jerked considerably when in the doctor's office where he is under great strain.

The only inference that I can draw from the fact that this doctor for the Santa Fe Railroad did not come here in Court is that his testimony would have been similar or would not in any great respect contradict the testimony of the plaintiff's doctor on the stand.

Now, continuing here:

"Q. Don't you know when you are doing it and when you are not doing it?

"A. I don't pay too much attention to it; no.

"Q. Mr. Barrett, were you ever"——

Then he goes into the conviction of the plaintiff.

Now, as far as I have been able to find, the only other reference to the twitching, and that has no bearing here, was on page 63, one question:

"Q. And this twitching, that unfortunate thing you have now, started around the latter part of May or the first part of June, 1955?

"A. Yes." [111]

I don't think there is any other reference to the twitching, other than that; which shows that the matter was not gone into with any great particularity at the time of the trial and the thing was left in great generalities, of course.

I would say now that if we were to retry the case and having then heard the testimony of the undercover men, we could pinpoint it to that extent. But that was at a time after the trial.

Now, there was no reason why—or, Mr. Welsh

didn't go into the matter of the conspiracy of Dr. Weaver, but I think that is a matter upon which at least in the affidavits, he placed great reliance, and he set up in the affidavit evidence that I am sure this Court wouldn't allow a jury to consider at the time of the trial. Of course, we have no objection to the Court reading the case, that is the case and circumstances from which he was exonerated or a pardon granted by Governor Knight during the year of 1953. But in their statement of the matters which Dr. Weaver was charged with, from none of the acts or a combination of these innocent acts could the Court infer fraud, particularly fraud prior to the time or during the time of the trial, and I want to allude to those. Mr. Welsh sets them out.

Well, first, they are the fact that he employed Dr. Weaver and, of course, no culpable act can be inferred from that because Dr. Weaver is licensed to practice his profession [112] here in the State of California.

The other act was that he sent the plaintiff in the action to Dr. Goren. But, of course, no attack is made upon Dr. Goren, nor could there be, but the inference is that this torticollis was conceived by Dr. Weaver on December 17th, and that is why the affidavits of the co-employees here stated that he had this jerking of his head and of his neck from a time within three months after the time the accident occurred down to the present time.

Now, I may be wrong about this, and I didn't go down and get any cases. I don't think it requires it, but I think the fact that the employees of this de-

fendant were in possession of such knowledge is imputed to and becomes the knowledge of the defendant itself and particularly under the circumstances where we subpoenaed three of their witnesses and they were instructed not to appear because they were not subpoenaed legally, and on that point I don't make any question, whether they got the right advice or not. That isn't the point that I wish to make. But, if the defendant was interested in hearing somebody that had information and knowledge about the condition of the plaintiff, they would have allowed these defendant's employees to come in and testify at the time of the trial.

Now, the affidavits disclose that immediately and as soon as Dr. Weaver met the plaintiff and he became a patient, [113] he wrote a letter and notified the defendant, and that is set forth in his affidavit, he setting forth what his diagnosis was. Then again the defendant asked for more details, and on January 14th, Dr. Weaver again wrote a letter to the defendant and set up more details.

Surely Dr. Weaver wasn't hiding his connection or association in the case and in that regard he said that he referred him to several other specialists, who came to the same conclusion and diagnosis that Dr. Weaver had come to.

Now, Mr. Welsh observed that Dr. Weaver came here and as he stated, I don't know how he arrived at what he did here, the fact that he observed the proceedings of this Court. He probably did observe, but Dr. Weaver in his affidavit states that he came here prepared to testify in the event his testimony

was needed, and the evidence discloses, even the information that the defendant has, that he had information that if he wished to become a witness, that depended upon the judgment of counsel for the plaintiff, he could have been called upon, but, I don't know as it would have made much difference but it was my conclusion that Dr. Weaver could have been asked whether he had been convicted of a felony. He probably could have disclosed the fact that he had been pardoned, but with the state of the evidence at that time, I felt that Dr. Weaver could not have added any testimony that was testified to by Dr. Goren, who in my opinion made a very [114] clean-cut witness. His cross-examination wasn't extended. The defendant didn't seem to make any serious or extended attack upon it, and it was allowed to stand unchallenged, both in respect to cross-examination and in respect to his position being challenged by the doctor who examined the plaintiff on the part of the defendant in this action.

I want to allude to this: in the affidavit of Mr. Welsh, he states that these are the things disclosed by the undercover men: Mr. Barrett drove his automobile, visited and talked with his friends, walked down the street, went shopping, performed other natural functions without a trace of the twitch which was so evident during the trial.

Well, if Mr. Barrett twitched or didn't twitch, I wasn't able to observe it, and even the one when they admit that he twitched all the time appeared no different to me than the others. Now, I am saying

that that is only my observation. The observations of the Court may have been different and Mr. Welsh's may have been different.

And so those are the revealing facts that he says intimate, amounts to fraud.

Mr. Barrett walked freely around the courtroom. For nine months he worked for the railroad, admittedly. He performed all the duties necessary to a waiter upon a train, working on a moving train carrying heavy plates of food and utensils, for nine months and, sure, when he saw his doctors, [115] this condition was getting worse and it was necessary to undergo treatment.

And if Mr. Barrett had been asked on the trial whether he drove his automobile, he would have said, "Yes," and he visited and talked with his friends. It was apparent that he talked to his counsel and walked around here and no attempt was made to conceal that. He certainly could talk with his friends.

There isn't any contention that he had any kind of an ailment. He had a torticollis. That makes it embarrassing in public, to go out with friends and have them observe this condition. But, as far as concealing that fact, there was no attempt to do it, because he was able to do those things during the entire time, and there is no contention that he wasn't. And it isn't the fault of the plaintiff that he wasn't asked those things on examination. His deposition was taken, a very thorough, complete examination with the exception I don't think they went into the

jerking very extensively, other than that the lawyer for the railroad, it wasn't Mr. Welsh, Mr.—

Mr. Welsh: Moffat.

Mr. Werner: —Mr. Moffat made the observation that, "You seem to be jerking here, and is that a condition that resulted from this accident?" And he said, "Yes." And that is about all there was to it. [116]

The Court: What was the date of the deposition?

Mr. Werner: A couple of months before the trial, your Honor.

Mr. Welsh: March 7, 1956, your Honor.

Mr. Werner: There was an opportunity along with the testimony that the defendant could have had from the different employees, you would have to assume that they would have testified the same for the railroad that they did to us in making their affidavits. Here is a deposition taken two months prior to the time of trial. Now, let us assume, your Honor, that with the presence of Dr. Weaver, by the letters being written and the reference having been made to it in the deposition suggested certain circumstances that might be suspicious, don't you think the proper time to have done that would have been at the time of trial, with all of the information that we gave them? Not only that, as soon as I got a report from Dr. Goren, I think the records will show, I sent them a full, complete copy of the testimony of our doctors. Does that show an attempt to conceal or suppress evidence of any kind or that we weren't making a claim that the torticollis

existed? And I am sure that Mr. Welsh will find those reports of Dr. Goren right in his file at this time.

So, there we have Dr. Goren's report. I didn't make an affidavit of that, and if you object to me referring to it, [117] it probably could be stricken.

Mr. Welsh: You are.

Mr. Werner: What?

Mr. Welsh: I have no objection.

Mr. Werner: All right.

We have the report of Dr. Goren that was sent as soon as it was made and as soon as it was received by me, and we have the testimony in the deposition to the effect that this plaintiff first saw Dr. Weaver and then saw Dr. Goren, and that is the observation of the plaintiff himself at the time of the deposition.

If there was any suspicion by reason of Dr. Weaver's connection with the case, that should have been made an issue of at the time of the trial.

I don't think there is any conflict or decisions to the contrary in the Federal Courts, and I have cited nothing but Federal Court decisions, and I am not saying that respecting Federal Court decisions that say that Rule 60(b) is based upon Section 473, so I am not making any objection to your reference there, Mr. Welsh, at all—that these matters where either party is in possession of the facts upon which they could have raised them as an issue, that it should have been done at the time of trial before the Court or before the jury, and that would have been the only fair thing to the plaintiff, because we feel

that if an issue, that it would have made no [118] difference to a jury if the matter had been gone into in more detail and he had said that when he wasn't under stress, and now we have to draw the inference so that in that this was an emotional thing, that during times of stress, such as appearing before the Court, the torticollis was more intense than it would have been at times when he was not under stress. Also, we would have had an opportunity, and I would have had no fear of putting Dr. Weaver on the stand under the circumstances, to explain his position in the matter. Then, without leaving the thing open, it would have been unnecessary to have drawn any inferences.

I don't think there are enough facts to draw an inference of fraud, but at that time Mr. Welsh could have asked Dr. Weaver, "Well, what did you do, what if anything did you suggest to Dr. Goren?" or whether Dr. Weaver suggested anything to the plaintiff in the action, and we could have gone into all those facts. The only thing that would have come out was whether or not Dr. Weaver had been convicted of a felony, and I am not so sure, under the circumstances that he would have had to have answered yes or no. At least the Court would not have allowed the reading of the decision in 56 Cal. App. 2nd to have been read to the jury, and even though the Court would allow the question as to whether or not he had been convicted of a felony, and of course, he could have shown that he was pardoned of that crime, but, [119] that is one definite and clear rule that is laid down in the Federal Courts, is that on

those matters you can't try those things piecemeal, you can't let them run over to a motion of this kind, and when the facts were at hand, and then for the first time present them to the Court and expect the Court to retry the case on that issue that could have been tried before a jury.

I think I have covered everything, and I know I can't think of anything else at this time. I wanted to cover everything that was raised in the defendant's brief and his argument.

Thank you.

Mr. Welsh: If I may reply, sir.

The Court: Yes.

Mr. Welsh: It will be a short reply.

Mr. Werner, as the good counsel he is, had ready explanation for his client's vagary while he was testifying during the trial. But it is important to note that whereas at the time of the trial he was not only reluctant but unwilling to directly answer these questions about whether he did this all the time, as to whether he did this at all times or sometimes less, and to all those questions at that time he didn't know, he couldn't remember, the impression was that he had it all the time as far as he knew, but now he knows enough to put it in an affidavit that he goes between one to four hours [120] without twitching.

It is quite true that we had Mr. Porter Barrett examined by a physician of our choice, to whom he gave the same history as he gave to Dr. Goren, and I have here to introduce the affidavit of John B.

Doyle, M.D., which sets forth what Dr. Doyle communicated to the Santa Fe.

In talking about doctors, there is no question but what Mr. Werner permitted us to review some of his medical reports. We don't accuse Mr. Werner. We accuse his client of misrepresentation and other misconduct.

I am sure it was a slip of the tongue when Mr. Werner said that these other seven employees that filed affidavits said that they had seen this twitching from three months after the accident occurred. That is not a fact. The fact is that they say that they have several months ago. Now, this was in July. They are talking of 1956. They say several months ago they observed the man twitching. Well, several months ago could be December of 1955, when they are in July of 1956. There was an utter absence of any direct testimony or affidavits on the part of these employees as to when they observed the twitching.

Now, it is a perfectly conceivable and logical thing that a man will not remember the day or even the month in which some twitching occurred. He had no reason to make a mental note of it. However, he worked for the railway [121] company between May of 1955, and December of 1955, and it would have been very simple to have these employees state if in fact it were so, that they didn't remember the date but that they remembered that while he was still working for the railroad that they saw this jerking, but not one of these employees stated that he saw this jerking during the time Porter Bar-

rett worked for the railroad company. There was one remark which I don't think was intended.

Mr. Werner: I intended the last remark.

Mr. Welsh: An affidavit which says within three months?

Mr. Werner: "Several months after the accident heretofore mentioned, I noticed Porter Barrett jerking his head at intervals," and there are several of them.

Mr. Welsh: But "several months," yes.

Mr. Werner: Several months, I think, would bring it right to June 7th.

Mr. Welsh: My point is, it is conceivable that the man might not remember the day or the month or even summer or winter, but it is inconceivable that he would not remember whether or not it was while he was working, and yet, not one affidavit indicates whether he saw he was jerking while he was working, and I think that is significant.

Now, insofar as subpoenaing of these employees was concerned, Mr. Werner knows the circumstances of that thoroughly. These men had requested of their employer, the [122] Santa Fe, if the Santa Fe would pay their salary to testify. The Santa Fe and the men have a Union agreement. One of the men went down to inquire, and they said, "Do we have to come?" And the lawyer wrote and said in his opinion the subpoenas were not valid. I discussed it with Mr. Werner. I suggested to him that if he would pay them, they wouldn't lose any money from their work, they would come. Now, that is the story about their witnesses they didn't put on.

Now, this is a case under the Federal Employers Liability Act. Perhaps the railroad doesn't deserve any help from its employees, but it certainly doesn't get any. There isn't any reason for the railroad to assume that every case is a case for "FBI Investigation," there isn't any reason for them to assume that there are misrepresentations and other misconduct on the part of the employee. It has very seldom happened. Your Honor has tried a lot of these railroad accident cases. You know that it is not often that an employee comes in and either lies or so grossly exaggerates as to make a thing entirely different than from what it was. I suppose it is natural for all of us to favor ourselves and our side of the case, but it is not very often that there is testimony of that ilk, of which we contend there is here.

Dr. Weaver did write a letter to the Santa Fe, but just as it was, there was no reason for the Santa Fe to believe that this was something which required investigation at that [123] time. Dr. Weaver could have written or Mr. Jones could have written to the Santa Fe, and although it isn't in the record, just for Counsel's information, I will tell you that it was Mr. Stein of the Stein Investigation Agency who said, "Dr. Weaver, that name rings a bell, I think he has been in trouble," and it was from there on that we began to find out about Dr. Weaver's past, so that the fact that we knew Dr. Weaver was in the picture at the time this case was tried has nothing to do with this motion.

And we don't contend that Dr. Weaver's situation in and of itself is determinative of anything.

We contend simply, therefore, that the man testified he jerked all the time, he did jerk all the time, whenever he was in the presence of any of the defendant's representatives or the court or at his deposition. And then afterwards, he doesn't jerk and he says in his affidavit he is free from it from one to four hours. Then when you combine these circumstances with the suspicious factors, including the participation of Dr. Weaver, it is cause for grave suspicion. But the actual fact is what he did during the trial and before, and what he did after the trial was over.

Mr. Werner very lightly goes over this deposition. He said we didn't go into this very much in detail, and that isn't true. These were questions asked by the counsel for the Santa Fe when the deposition was taken, page 43: [124]

“Q. And I have noticed during the questioning of you that you have been twitching your head or your head has been twitching. When did that first begin? A. Oh, about May, 1955.

“Q. Your head has been twitching almost continuously through this questioning. Has it been that way since May? A. Yes, sir.

“Q. Does it twitch all the time?

“A. Yes, very seldom without it.

“Q. Can you control it? A. No, sir.

“Q. Was your head twitching as it is now when you visited these doctors in Chicago in April of 1955? A. No, it hadn't started then.

“Q. It started some time in May and has continued all the time? A. That’s right, sir.

“Q. It is my impression that this twitching occurs every few seconds almost, is that the way it has been? A. That’s right.”

Now, I ask your Honor if this is consistent with what evidence he has now filed and what we have seen here this afternoon?

Mr. Werner: I just want to call the Court’s attention [125] to these affidavits on that.

The Court: You have, if all you are going to do is repeat. Frankly, I don’t think there was much to it as far as the argument of either one of you with respect to the affidavits. You pointed out that in the affidavits they say that they first noticed the jerking several months after the accident occurred, and I don’t know what that means, if anything.

Mr. Welsh points out, well, several months might mean any time, and, of course, it might mean two months, and it might mean a year, but I don’t see the importance of that.

Of course the fact remains that the burden rests upon the defendant with respect to this motion.

I do not sit here for the purpose of weighing evidence for the purpose of determining whether or not the plaintiff is entitled to recover in the case. That is not my function in the hearing of a motion such as this, and I will be candid to say that there are some strange things in it, the thing that caused you to become suspicious, the connection of Dr. Weaver, the mere fact that he is in the picture that there is some suspicion, but, of course,

that is only suspicion. It might merely be a coincidence that he happened to be in the picture.

If the jury were trying the case today and weighing the evidence and had everything presented to them that we have [126] at this time, assuming that that were possible, I am not sure that they wouldn't come in with the same verdict that they came in with before.

Now, here is another thing that seems so strange to me: You have introduced here this affidavit of Dr. Doyle, and it includes his statement following his examination, which he furnished you last April, after his examination, and to show you how accurate he was, or at least what has occurred here could very well fit in exactly with what he forecast, he said:

"From these data it would appear that as a result of the accident of February 11, 1955, the patient sustained a contusion of the scalp without losing consciousness. The evolution of his symptoms was gradual and unquestionably was aggravated by resentment toward an official in the Commissary Department of the Railway of Chicago. The clinical picture is not that of spasmodic torticollis but rather of habit spasms."

In other words, your doctor told you that to start with, that it was not torticollis, but rather a habit spasm. He said:

"In my opinion Mr. Barrett's symptoms are due entirely to mental causes. In this case settlement of litigation may be expected to be followed by his prompt recovery." [127]

In other words, your own doctor, who did not come in and testify, you didn't put him on the stand, if he had come in and testified, he would have told the jury that, and if he told the jury that, it could very well have been the jurors would have felt that, "This may disappear," and, as a matter of fact, if you then showed the jurors these pictures, and assuming that they felt that there was no twitching or even if he wasn't twitching at all today, they could very well say, "Well, that is not inconsistent with the testimony of the doctor."

Mr. Welsh: May I explain that, if your Honor please?

The Court: And, as a matter of fact, although I don't recall exactly without reading it, my recollection is that Dr. Goren was questioned in that connection. I think you in cross-examination asked Dr. Goren if it might not be habit spasm.

Mr. Welsh: That is right, I did say that.

The Court: And I think that Dr. Goren said they might be. I am still not satisfied. Assuming I have to pass on that question, I am still not satisfied that the jury wouldn't believe it, what that evidently turned out to be, habit spasms; that if the jury had the evidence presented to them, the evidence that was presented to me this afternoon, and if the jury believed that he no longer had those, the jury might very well conclude, well, they were habit spasms and [128] this Dr. Doyle has indicated they were caused by his mental processes; so maybe we gave him too much money, but there isn't any fraud or misrepresentation.

In other words, if you had put Dr. Doyle on the stand and Dr. Doyle had testified to this as he states here and you had Dr. Goren's testimony, it might very well be that the jury would sit there and say, "Well, if Dr. Goren is right and he anticipates that this will last for a long time, it is worth \$12,000.00; and if Dr. Goren is not right and Doyle is right, it isn't worth \$12,000.00, it is perhaps only worth \$5,000.00." Now, it could very well be that that would pass through the minds of the jurors. But the jurors conclude that they believe Goren, and so they give him a verdict for \$12,000.00 and they know at the time that it may develop that it won't last that long, they just use their judgment in trying to figure how long it will last, how badly he was damaged, and it develops that he wasn't as badly damaged as he thought he would be; in other words, assuming, as I say, that you did produce the evidence here that clearly shows that he no longer had a twitch at all, and I am not satisfied that the showing does show that he no longer has a twitch, but even if it shows that he no longer has that twitch, it would be, as I say, consistent with this, and my recollection is of Dr. Goren's testimony on cross-examination, that he left that open. He said it might be, or words to that effect, but in [129] his opinion it would last for a long time.

Mr. Welsh: If I may, sir, I would just like to explain.

The Court: Yes.

Mr. Welsh: The other doctor, I forget his name——

Mr. Werner: Heifetz.

Mr. Welsh: —Dr. Heifetz said quite frankly that it was all mental, psychological, but Dr. Heifetz and Dr. Goren both said that the etiology of the mental aberration was the blow on the head. And Dr. Doyle thought otherwise.

Your Honor has had a great deal more experience than I have, but my experience is that one of the most potent weapons that a plaintiff has is a traumatic neurosis, which is what Dr. Heifetz admitted it was in fact, but Doyle said it was just a neurosis, period, he wouldn't say it was traumatic. But this traumatic neurosis is the most difficult thing. Everyone admits it was neurosis. So it is just a question of whether it was traumatic in origin.

So, in my opinion I would not have gained anything by putting Dr. Doyle on the stand except he would have testified the blow didn't do it, it was something else.

When you imply a man is faking and you can't prove it, it is a very dangerous thing to do at any time, any place, and especially before the jury.

The Court: Of course, I am not indicating, Mr. Welsh, nor am I critical of the manner in which you tried this case, [130] that you should have.

Mr. Welsh: No.

The Court: I am not saying that you should have. The fact is that you didn't attempt to convince the jury that this was in fact a habit spasm and it wouldn't last very long.

Mr. Welsh: Yes.

The Court: In other words, while you might not have said it, you in effect tried to convince the jury

that reading between the lines as far as a medical testimony is concerned, the probability is that this man's jerking would stop as soon as he was in a more peaceful atmosphere, and, of course, you may have been right.

Mr. Welsh: Apparently.

The Court: You may have been right. If you were right, then, of course, he would now no longer have it. But the jury believed that it would be of a more permanent character, or apparently they believed that, because they believed that he was entitled to \$12,500.00.

The motion is denied.

Mr. Werner, you will prepare, serve and lodge a formal order in accordance with Local Rule 7.

[Endorsed]: Filed November 7, 1956. [131]

United States District Court, Southern District of
California, Central Division
No. 19270-WB

PORTER BARRETT,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Kansas Corpora-
tion,

Defendant.

DEPOSITION OF PORTER BARRETT
called as a witness by the defendant on Wednesday,
March 7th, 1956, beginning at the hour of 9:30

(Deposition of Porter Barrett.)

o'clock a.m., at Room 620, 215 West Seventh Street, Los Angeles, California, before E. S. Brink, Notary Public in and for the County of Los Angeles, State of California.

Appearances:

For the Plaintiff:

ERWIN P. WERNER.

For the Defendant:

ROBERT W. WALKER, and

HENRY M. MOFFAT, by

HENRY M. MOFFAT.

PORTER BARRETT

the plaintiff herein, called as a witness by the defendant, being first duly sworn by the Notary Public, was examined and testified as follows:

Direct Examination

By Mr. Moffat:

Let me propose the following stipulation, Mr. Werner, that the deposition of Mr. Barrett is being taken pursuant to oral stipulation between the parties hereto in accordance with the provisions of Section 2021, subsection 1 of the Code of Civil Procedure and Section 2055, that all objections as to the form or manner in which the questions are asked are reserved until the time of trial and likewise all motions to strike are reserved to the time of trial; thirdly, that the deposition may be signed before any Notary Public, and, finally, that if the

(Deposition of Porter Barrett.)

deposition is not signed at the time of trial, provided the witness has had a reasonable opportunity to read, sign, and correct same, it may be used with the same force and effect as if signed.

Mr. Werner: I think that is a very reasonable stipulation.

Mr. Moffat: Thank you, sir.

Q. Your full name is what, sir?

A. Porter Barrett.

Q. Where do you live, Mr. Barrett? [2*]

A. 7441½ East 32nd Street.

Q. It is in the City of Los Angeles?

A. Right.

Q. What is your age? A. 43.

Q. Mr. Barrett, you know undoubtedly that because you filed a lawsuit against the Santa Fe that we have this right and opportunity to ask you questions about the subject of that lawsuit?

A. Yes.

Q. I don't intend to ask you any tricky or clever questions but merely to find out what you know about the accident and how you are feeling, and so forth. As your counsel has undoubtedly told you, if you can answer the questions you should give an answer. If you don't know the answer to any of the questions that I ask you, simply state you don't know or anything else that you want and we will understand. You know that you have taken an oath now to tell the truth and the testimony that you are giving here today is just as solemn as

(Deposition of Porter Barrett.)

though you were testifying in court before the jury and judge. Now, if you don't understand any of the questions that I ask, Mr. Barrett, you indicate that you don't understand them, and I will try and rephrase them or repeat them so we will have an understanding then, you see. And if you don't indicate that you don't understand a [3] question then I will assume that everything I ask you you understand.

Now, have you understood everything I have told you, sir? A. I think I have.

Q. All right. Fine. How long have you lived at your present address?

A. Oh, I say a couple of months.

Q. A couple of months? A. Yes.

Q. Incidentally, will you keep your voice up in here, if you can? We are competing with a jack-hammer outside. And who do you live with, sir?

A. A boy friend of mine.

Q. What is his name? A. David Holmes.

Q. Where does he work?

A. Let's see, Air Base, Army Air Force some place out in Maywood. I don't know the address.

Q. The Air Force Depot probably in Maywood?

A. It could be.

Q. Now, where did you live, sir, just before you moved to your present address?

A. 2929 Van Buren Place.

Q. In Los Angeles? A. Yes. [4]

Q. And how long did you live at that address on Van Buren? A. Approximately two years.

Q. Yes. And who did you live with at that ad-

(Deposition of Porter Barrett.)

dress? A. I live alone.

Q. You lived alone? A. Yes.

Q. Are you married, incidentally?

A. Well, according to law, yes, but I am not together.

Q. You are separated from your wife?

A. Yes.

Q. What is your wife's name, sir?

A. Janivee.

Q. And where is she presently residing?

A. (Witness shakes head negatively.)

Q. You don't know? A. No.

Q. When did you last see her?

A. About '51.

Q. Do you have any children by that marriage?

A. Yes.

Q. And what are their names and their ages?

A. The boy is named Fenton. He must be about 22 now, I guess.

Q. Did you have a girl, too? [5] A. No.

Q. Just one child? A. Yes, by her, yes.

Q. Do you have a child by a previous marriage?

A. (Witness nods head affirmatively.)

Q. Can you tell me that youngster's name?

A. Shirley.

Q. What is her age?

A. Six or seven now, I guess, somewhere along there.

Q. What was your previous wife's name, sir?

A. Nellie.

(Deposition of Porter Barrett.)

Q. And where does she reside?

A. In the city here some place.

Q. Do you know what name she is using?

A. No.

Q. Do you know if she is using the name of Nellie Barrett?

A. No; she got married, I do know that. I don't know her name.

Q. Now, was Fenton born of the marriage between you and Nellie?

A. (Witness shakes head negatively.)

Q. He was born of the marriage between you and—what is it, your wife's name?

A. Janivee.

Q. Janivee. And Shirley is of what [6] marriage?

A. That is in between, if you want to know the truth.

Q. All right. Now, when you lived at the address on Van Buren you lived alone?

A. (Witness nods head affirmatively.)

Q. Is that right? A. That's right.

Q. When did you start to work for the Santa Fe, Mr. Barrett? A. 1946, May 8th.

Q. And when did you stop working for the Santa Fe?

A. I arrived here the 17th day of December, 1955, and I hasn't worked since.

Q. Between those two dates, May 8th, 1946, and December 17th, 1955, you worked continually for

(Deposition of Porter Barrett.)

the Santa Fe with the exception of layoffs, is that right? A. That's right.

Q. Now, the accident on the train happened on the 11th day of March, 1955, is that right?

A. As near as my memory serves me, yes.

Q. And it happened while you were in the kitchen of the dining car?

A. We call it the pantry, sir.

Q. The pantry. I see. That was train No. 17?

A. That's right.

Q. Westbound? [7]

A. (Witness nods head affirmatively.)

Q. Santa Fe Super Chief? A. Yes.

Q. How did the accident happen, Mr. Barrett?

A. Well, it was during the dinnertime, and we was fairly busy then and I was in a stooped-over position opening what we call them, chill boxes; in other words, known to you as ice boxes, to be more correct, so you understand what I am talking about. There were two doors, one way they had one door and the other way another door and it came together to a small strip. In other words, when the doors came together you couldn't see the strip, a little lap-over, you know. I was getting something, I don't recall what, but getting something and another waiter getting something. So when he got through before I did, he slammed this door and struck me in the head.

Q. Who was that other waiter?

A. His name is Al Williams.

Q. Does he have any nickname?

(Deposition of Porter Barrett.)

A. No, that is his full name, as far as I know.

Q. And on which side of you was he at the time of the accident?

A. Well, he would be to my right, the way I was standing he would be to my right.

Q. Would you have been facing, let's say, south, generally south at the time of the accident? [8]

A. No, I would be facing east, the direction in leaving Chicago we would head west and my face would be to the tail end of the train, which would be east.

Q. I see. But the chill box is located along one of the sides of the pantry, isn't it, rather than the end?

A. The chill boxes on the Super Chief is located, I would say, as I am facing you along like this, it would be the right-hand side of the train. As you walk into the pantry, I come in the door, just as I am coming in——

Q. Fine.

A. That would throw the chill boxes to my right.

Q. I see. As you walked into the pantry you would be walking toward the rear end of the train?

A. No, walking toward the head of the train.

Q. Walking toward the head of the train?

A. Yes.

Q. Excuse me. And the chill box as you walked into the pantry is on your right?

A. On my right, that's right.

Q. So if the train were going from east to west

(Deposition of Porter Barrett.)

the chill box then would be, let's say, on the north side of the train, wouldn't it?

A. Yes, that would be right, north, yes.

Q. Now Mr. Barrett, when you approached the chill [9] box did you open the door of the chill box to look for something? A. Yes.

Q. Well, at the time, sir, that you approached the chill box, and I imagine you had to bend down, didn't you?

A. Definitely stooped-over position, that's right.

Q. Well, as you approached the chill box and bent down you opened one of the doors?

A. Yes.

Q. Now, was that the door on the right-hand side of the chill box or the door on the left-hand side of the chill box?

A. I opened the chill box on the left-hand side. The other waiter opened the box door on the right-hand side.

Q. Now, had he already opened the door, sir, on the right-hand side at the time that you reached down and opened the door on the left-hand side?

A. I don't remember.

Q. You don't remember? A. No.

Q. Do you remember him being at the chill box when you opened the door on the left-hand side?

A. No, I don't. In a heck of a busy dinner like that it is very easy to forget. I won't say I was there first or he was there first, I wouldn't say. [10]

Q. You don't know?

A. I don't remember.

(Deposition of Porter Barrett.)

Q. Now, I take it then, sir, that your head was struck by the left-hand door of the chill box?

A. The right-hand door.

Q. The right-hand door?

A. The right-hand. I was looking in the left door, the left-hand door was my door and the right-hand door was his door.

Mr. Moffat: Would you read that answer?

(Last portion of record read.)

Mr. Werner: That is the right-hand as you were facing the box.

Mr. Moffat: Yes, that is our understanding.

Q. Well, now, Mr. Barrett, between the left-hand door and the right-hand door of this chill box there is a—I am trying to reach for the right word—a margin or strip of metal separating the two doors, isn't there? A. Right, sir.

Q. What is the approximate width of that?

A. An inch, I guess, I don't know. I really don't know.

Q. About an inch, maybe two inches?

A. No, I wouldn't say that much. I have never measured it so I don't know any estimate I would give, I would probably be way off. [11]

Q. I don't want you to guess on it.

Mr. Werner: It is there and it can be measured.

A. That's right.

Q. (By Mr. Moffat): What I want to know, Mr. Barrett, did your head strike the right-hand door of the chill box? A. No, it did not.

(Deposition of Porter Barrett.)

Q. Well, did the right-hand door of the chill box strike your head?

A. Through the action of the other man, he slammed the door against my head after he finished.

Q. Where was your head with reference to the strip of metal that divided the left-hand door of the chill box from the right-hand door at the time that the right-hand door struck your head?

A. As near as my memory can serve me, sir, if you are in a stooped-over position there is not enough metal to hardly tell the distance between the two doors, if you are in a stooped-over position, whatever door would slam would hit you on the head if you were in a stooped-over position, if anyone would slam either one of the doors and I was in a stooped-over position, my head undoubtedly, if this is the metal here, it was probably too far over in the closing of this other door.

Q. I see. At the time that you say your head was struck by the right-hand door of the chill box, were you looking into the right-hand side of the chill box? [12]

A. That I don't know. I know I was trying to get out something of the box. Therefore, the shelves, the two doors go all the way across in there, it is not a separated part.

Q. There is no partition between the two?

A. No, there is no partition between the right-hand door and inside the box, open the door and you can reach either side on these shelves, there is

(Deposition of Porter Barrett.)

no partition at this particular time. I don't know whether I was looking for something on either side, I don't know. I really don't know.

Q. So you can't tell us whether you were looking or reaching into the right-hand side of the chill box at the time your head was struck by the door?

A. As far as my memory serves, I was just merely looking for the object I wanted to get before I reached in to get it. I think I was just looking for it to make sure so I wouldn't spend too much time moving things, I was looking in to see if I could see it, if I could reach in and get it, and that was all over with, see.

Q. When did you first become aware there was another waiter, this waiter named Al Williams, standing or kneeling beside you at the chill box?

A. As I stated a moment ago, I don't know whether he was there or was I there first. At a heck of a busy dinner there you get all confused and everybody is pushing, [13] shoving, in a hurry trying to get the service out. Truthfully I don't know.

Q. You don't know. All right. Did you hear him say anything to you before the accident?

A. No, I didn't.

Q. Did you say anything to him, sir, before the accident?

A. I would say no, I don't know.

Q. Well, just immediately before the accident,

(Deposition of Porter Barrett.)

Mr. Barrett, did you see him beside you working or looking into that right-hand side of the chill box?

A. Shall I use the phrase for that, sir, we call it in serving dinners and any meal, we use the phrase "up tree." Everybody is so busy, he's trying to think of one thing.

Q. You answer this question, if you can.

A. I don't remember.

Q. I know there are a lot of details in your job. I want to know if you saw him there beside you. He would be roughly on your right-hand side, wouldn't he? A. That's right.

Q. I want to know if you saw him there, sir, just before the door struck your head.

A. I couldn't absolutely say it was Al Williams or anyone because there were seven or eight men in the pantry, and I was not looking directly in it, and I didn't [14] recognize him, that it was him slammed the door at that particular time, it could have been any waiter.

Q. Did you know that, sir, just before the accident there was a waiter working on the right-hand side of the chill box?

A. I know the door was open. I don't know who was working until after the accident and he hol-lered "Oh, I'm sorry," then I looked up and I saw who it was from a sitting position on the floor.

Q. You were in a sitting position on the floor at that time? A. Yes.

Q. To sum that up, and tell me if this is fair, you know that when you were working in the chill

(Deposition of Porter Barrett.)

box that the right-hand door of the chill box was open before the accident; that's correct, isn't it?

A. Yes, I believe it was. I am not——

Q. And you know someone was working at the right-hand side of the chill box, but you didn't know it was Al Williams until after the accident, is that correct?

A. It was possible I knew he was the one that slammed, he admitted he slammed the door on my head.

Q. You knew there was a waiter there working on the right-hand side, but you didn't know it was Al Williams until after the accident?

A. That's right. [15]

Q. Now, at the time of the accident, Mr. Barrett, or immediately before it, I take it there was no lurching or swaying or unusual motion of the train or the dining car in which you were riding; that's correct, isn't it?

A. Well, sir, getting aboard the train, I will answer your question, I never paid too much attention to the motion of the train, unless it is a severe jolt or something, like once I get on it and it gets in motion I am immune to it then.

Q. You are accustomed to the ordinary movements?

A. It would have to be something unusual for me to notice it.

Mr. Werner: What are you trying to say?

Q. (By Mr. Moffat): You didn't notice any unusual jolt or lurch or movement of the train?

(Deposition of Porter Barrett.)

A. No.

Q. At the time of the accident or immediately before? A. No.

Mr. Werner: All right.

Q. (By Mr. Moffat): So it is your belief that the cause of the accident was the door being closed while you had your head near it, isn't that right, rather than any motion of the train?

A. Yes, sir; that is my belief. Yes, sir.

Q. All right. Incidentally, you don't remember what object you were looking for in the chill box at the [16] time of the accident, do you?

A. If my memory serves me right, I was looking for some kind of steak sauce, I believe I was at that particular time.

Q. At the time of the accident, Mr. Barrett, were you in a kneeling position or squatting down or just bent over?

A. I was in a stooped-over position, sir.

Q. Can you stand up now and show us about——

A. Like this.

Q. You bent from the hips down?

A. That's right.

Q. Thank you. Was that about the same position that Mr. Williams had at the time of the accident? A. I wouldn't know, sir.

Q. Now, do you know, Mr. Barrett, what part of that right-hand chill box door struck your head?

A. I don't know what part, no. I would say it was the inside part of the door, but I don't know.

(Deposition of Porter Barrett.)

Q. You don't know whether it was the center of the inside part or——

A. No, I don't know.

Q. Or the edge? A. I don't know.

Q. Can you stand up, if you will, and let's say face to the north, the position you were in at the time of [17] the accident, and then point to the part of your head that was struck by the icebox door, or chill box door, rather?

A. Well, here, about in here, sir. This is where all the hair came out.

Mr. Moffat: Mr. Werner, can we stipulate the witness is indicating roughly the top right-hand side of his head?

Mr. Werner: Yes.

Mr. Moffat: I would say about the middle of the head.

A. That's right, sir.

Mr. Moffat: All right. Thank you.

Mr. Werner: You say that is where the hair came out?

A. Yes, sir, about as big as a silver dollar came out of there.

Mr. Moffat: I am correct, aren't I, Mr. Barrett, in assuming that the left side of your head didn't strike anything at the time of the accident?

A. The left side of my head?

Q. Yes, sir. I am referring from the top down to the jaw on the left side.

A. I know what you mean by the side, I know I was struck in about the center part of my head.

(Deposition of Porter Barrett.)

Q. Up here on top? A. Yes.

Q. Well, I was referring to the left-hand side of your head. For instance, I will face north. You indicated, [18] Mr. Barrett, that the chill box door struck you on top of the head about the middle.

A. Yes.

Q. I wanted to know if any part of the left side of your head struck anything at the time of the accident? A. I don't remember.

Q. Pardon? A. I don't remember.

Q. What did you do immediately after the door struck the top of your head?

A. Well, I don't think immediately after it happened, I think it taken me a few minutes to get my wits back together. I was sitting in the middle of the pantry the first thing and I remember the kids was wetting—putting on ice on my head.

Q. Did you get up after a few seconds?

A. Yes, I did.

Q. And did you say anything to Mr. Williams, the other waiter?

A. I probably did, but I don't think I would repeat it here.

Q. Well, you can repeat it if you want to.

A. The words that I used, I wouldn't repeat them.

Q. They were swear words, were they?

A. Oh, definitely.

Q. Did he say anything to you at that time? [19]

A. What he said I haven't the slightest idea. No doubt the man, he was the main fellow trying

(Deposition of Porter Barrett.)

to give me some aid, but what he say, I don't know. I think he said a lot of things that didn't make sense, probably did make sense, but I don't know what they were. I know the man could say he was sorry or something like that, but I don't know word for word what he said. I wouldn't have the slightest idea what he said or what I said, to tell you the truth. I know I used a lot of profane language at the time it happened. What the words were, I wouldn't know myself right now.

Q. Then you put an ice pack on your head, is that it?

A. No, I didn't. Some of the other fellows did.

Q. How did your head feel right after the accident?

A. Well, how would a bump on the head feel? I know it was bleeding and they were trying to stop the blood from flowing, for one thing.

Q. Did the blood come down over your face?

A. No, it just got mangled all in my hair.

Q. Did it get on your clothing?

A. Yes, a little got on my jacket. Yes, I had to change jackets.

Q. Well, did you continue serving the party in the diner that you were serving?

A. No, another waiter finished the party that I was serving. [20]

Q. You stayed in the pantry, I imagine?

A. Yes.

Q. And continued to put ice on your head?

A. That is correct.

(Deposition of Porter Barrett.)

Q. All right. Did you serve any people in the diner after the accident?

A. Yes, sir; I finished dinner.

Q. What time did the accident happen, do you recall?

A. Oh, I would say about 8:30, something like that. It takes, it's just out of Joliet, it takes us about half an hour or forty-five minutes, it was about 8:45, something like that. It takes about forty-five minutes to run from Chicago to Joliet, so it happened just west of Joliet, so 8:30, quarter to nine, something like that.

Q. That was in the evening, wasn't it?

A. Yes, sir.

Q. The train was just a little bit west of Joliet?

A. That's right, sir.

Q. That is Joliet, Illinois, isn't it?

A. That's right, sir.

Q. Well, let's see, after the accident you took a rest in the pantry for what, fifteen minutes or so, and then you went out and finished serving; is that about right?

A. Yes, sir; I finished serving dinner.

Q. Dinner would be over about 10:00 o'clock at night, something like that? [21]

A. On the Super Chief, sir, sometimes we are just getting started.

Q. Sometimes you go to midnight, I imagine?

A. Oh, definitely. That particular night I don't know, maybe we got through by the 12:00 o'clock time because I know we had a very big load that

(Deposition of Porter Barrett.)

night and I would say dinner was over at 11:00 o'clock, somewhere around there.

Q. What did you do after you had finished serving dinner?

A. We have side work to do, sir, and we do that. We have to put the car in order for the next morning and then we go to bed.

Q. Did you make a report of this incident to the steward? A. Yes, sir; that night.

Q. That night? A. Yes, sir.

Q. He asked you questions about how it happened? A. Yes, sir.

Q. What was the steward's name?

A. Philip W. Krause.

Q. You answered his questions?

A. Yes, sir; I did.

Q. Did you fill out a report?

A. Yes, sir. [22]

Q. Was it that night? A. Yes, sir.

Q. Well, how were you feeling, Mr. Barrett, when you finished, let's say, your tour of duty that night and were getting ready to go to bed?

A. I don't know. I say I felt all right, only I had a little—my head felt sore.

Q. Yes. I imagine the bleeding had stopped?

A. Well, yes, they had a waiter aboard that had put a lot of salt in my head, something I had never known of to stop it from bleeding. It stopped bleeding.

Q. You didn't wear a bandage up there while you were serving tables?

(Deposition of Porter Barrett.)

A. No, they stopped the blood.

Q. Pretty soon after?

A. That seemed to be the only thing at that particular time, was to stop it. Of course, I couldn't wait table with blood on my head, even in my hair, and they got it all out with cold towels.

Q. Then you changed jackets and went out and served dinner, is that right? A. Yes, sir.

Q. Did you have a fair sleep that night?

A. Well, I don't know. It's been so long. I don't know how I rested. I probably had a pretty rough night, half the night I was taking Anacin and that is half [23] the doggone night, so I wouldn't say it was very restful.

Q. Well, you didn't ask the steward to get a doctor for you that night, did you?

A. No, I didn't, no.

Q. Let's see, the accident happened on March 11th at or near Joliet, Illinois. You had another day's work ahead of you, didn't you?

A. Yes, sir.

Q. You worked the following morning and the afternoon and so forth? A. Yes, sir.

Q. And, in other words, you worked your regular trip? A. That's right, sir.

Q. When would you have arrived in Los Angeles? A. The 13th.

Q. The 13th? A. 8:30 a.m.

Q. What did you do after you arrived in Los Angeles, Mr. Barrett, did you go home?

A. Yes, I did.

(Deposition of Porter Barrett.)

Q. And when did you next work?

A. The 14th.

Q. And on what train?

A. Super Chief No. 18 out of here.

Q. Eastbound? [24] A. That's right, sir.

Q. And when did you arrive in Chicago?

A. That would be on the 16th.

Q. Then did you lay off a day and then come back?

A. Layed off four nights and came back.

Q. Now, when did you first see a doctor after this accident?

A. I saw—I believe the first doctor I saw was 4-17, I believe. That would be April.

Q. The 17th, wouldn't it?

A. I am not so sure, I am not sure.

Q. You think it was April 17th?

A. I am not sure.

Q. Well, was it in the month of April? Let me ask this: Who was the doctor? Maybe that will help you establish the date in your mind.

A. The first doctor I saw was here in the City of Los Angeles. It was Dr. Bernard Jacobs.

Q. Now, remembering his name, does that help you establish the day or the approximate day that you went to see him?

A. Also the same day I went to him—now, if these dates are correct, I am not positive about these dates being correct, but I am sure the Santa Fe Hospital would have the same date, because the

(Deposition of Porter Barrett.)

same day I went to him I also went to Santa Fe Hospital. [25]

Q. Did you see Dr. Jacobs before you went to the Santa Fe Hospital?

A. I believe I did, yes. He recommended me to go to the hospital.

Q. Now, that doctor's name is Bernard Jacobs?

A. That's right, sir.

Q. And where does he practice?

A. In Los Angeles. I believe it 9300 South Central. I think it is somewhere, 92nd or 9300 south.

Q. And you think, and I know you don't want to be bound, but you think it was around April 17th?

A. No, that couldn't be right. No, it couldn't be right because I was in Chicago the 16th. Well, this is still March, though. This could be possible, this is another month. That date could have been just about correct, as near as my memory serves me.

Mr. Werner: He is asking if that is your best recollection.

Mr. Moffat: That's all. I understand sometimes these dates are difficult to remember. Could we put it this way, that it is your recollection that you saw Dr. Jacobs about a month or so, well, about a month, let's say, after the accident?

A. That's right, sir.

Q. And that the same day you saw Dr. Jacobs you also went to Santa Fe Hospital in Los Angeles? [26]

A. That's right, sir.

(Deposition of Porter Barrett.)

Q. All right. And why did you go to see Dr. Jacobs?

A. The only reason is he had been in my family a long time and I thought I would go out and see him because I had a feeling——

Mr. Werner: He wants to know your physical reason.

A. Well, the physical reason is because of my head, that is the reason I went there.

Mr. Werner: That's all he wants to know.

Mr. Moffat: What about your head was bothering you?

A. Yes, it was bothering me all along this time, I was still working but I had a headache and headache and I had been noticing that my hair was coming out from the injury that I had received in my head, it was a clog there and no hair wasn't coming out, and I would comb it and it would come out in big bunches.

Q. So you went to see Dr. Jacobs?

A. That's right.

Q. Dr. Jacobs was your family doctor?

A. Yes.

Q. He had treated you or—— A. No.

Q. Had you been to him on previous occasions before the accident? A. Yes, sir. [27]

Q. You told Dr. Jacobs, did you, about the accident and how you felt? A. That's right, sir.

Q. And did he treat you or examine you?

A. No, he just looked at my injury and recommended me what I should do, that I should go to

(Deposition of Porter Barrett.)

the hospital and have some X-rays taken of my head.

Q. He didn't take any X-rays himself?

A. No, he didn't.

Q. So you agreed it would be a good idea to go to the Santa Fe Hospital? A. Yes.

Q. Now, who did you see at the Santa Fe Hospital? A. I don't know his name, sir.

Q. It was a doctor? A. Yes, sir.

Q. Did you tell him about your complaints?

A. That's right, sir.

Q. Did you tell him that you had headaches?

A. Yes, sir.

Q. Was that the sole complaint you had at that time, Mr. Barrett? A. Yes, sir.

Q. Otherwise you felt okay?

A. That's right, sir.

Q. Did that doctor examine you? [28]

A. I am quite sure he did, yes.

Q. Did they take X-rays of you that day?

A. No, sir.

Q. What did that doctor tell you to do to help your condition?

A. He recommended me when I got back to Chicago to see a doctor back there.

Q. Was Chicago kind of your headquarters?

A. That's right. See, working as I was working at the time, my train headquarters was there which would automatically make me out of Chicago, although I lived here.

Q. You had more layover time in Chicago?

(Deposition of Porter Barrett.)

A. That's right, and my hospitalization was paid out on the West Coast to the East Coast. Therefore, they would only take an emergency out here. You had to be damn near dead before they would take you over here.

Q. Incidentally, did that doctor prescribe anything for you?

A. I know he wrote out a slip, sir, but the company has it some place. I haven't. Dr. Butee's office in Chicago, I don't know what he has.

Q. You don't recall telling him to take any medicine, or him giving you any medicine? A. No.

Q. Did you feel able to work, Mr. Barrett, at the time you saw this doctor at Santa Fe [29] Hospital?

A. Yes, I worked all along and taking Anacins and aspirins and Sal-fayne and Bufferins and what have you.

Q. When was it, Mr. Barrett, that you first had headaches after the accident, was it a week or two after the accident?

A. I don't think I was ever out of a headache after I had this accident, as far as my memory serves me.

Q. You had them the day following the accident? A. That's right.

Q. Well, in that month after the accident or up until the time that you saw Dr. Jacobs and this doctor at the Santa Fe Hospital, did you have headaches every day? A. Yes, sir.

(Deposition of Porter Barrett.)

Q. They were relieved somewhat by the Anacin and aspirin, I imagine?

A. For a little while, yes.

Q. Did you complain to any of the Santa Fe people such as the steward or your fellow waiters about these headaches?

A. Oh, yes. In fact, one of the waiters recommended the Sal-fayne to me which I had never heard of for headaches.

Mr. Werner: Who recommended that?

A. One of the waiters.

Mr. Werner: One of the waiters. [30]

Mr. Moffat: Did you during that period of time I just referred to ever complain to the steward about these headaches?

A. Oh, definitely, yes.

Q. That was the same steward, Mr.—

A. No, the same steward with me for approximately three trips during this time, which was about a month.

Q. Yes.

A. From the time I had this accident, yes, he was with me all this time.

Q. That is Mr.— A. Krause.

Q. Mr. Krause? A. That's right.

Q. You complained to him about your headaches?

A. Yes, and he advised me to go see a doctor, take off, what the heck, keep running up and down these roads here with headaches like you have, some time you might pass. Why don't you take off and

(Deposition of Porter Barrett.)

go see the doctor? I said there was nothing to it, I didn't know too much about it, you know, so I continued working and arrived in Chicago on April 22nd, if my memory serves me right, I went to see Henry B. Matthews, company doctor there in Chicago.

Q. How did you happen to see him, were you recommended to him or—— [31]

A. Well, no, sir, you go there to the commissary and you ask for a slip to see a doctor, you put the doctor you'd like to go to. He was close to the hotel I was stopping at so I said "I will go to Dr. Matthews," which was a couple of blocks from where I was stopping. It was more convenient for me.

Q. Did you know Dr. Matthews? A. Yes.

Q. You had seen him on some occasion previous, I imagine?

A. That's right, sir. And he examined my head which was completely bald then. And he also gave me a prescription to buy some kind of a salve, I don't have it in my pocket, but I still have it. It is a jar about the size of this to use and he also gave me a written slip to give to my employers, there in the commissary, Mr. Ford.

Q. Yes.

A. To be admitted to Topeka Hospital in Topeka, Kansas.

Q. Excuse me, for interrupting, but is Dr. Matthews a local surgeon for the Santa Fe?

A. I don't know what his standard is. His name

(Deposition of Porter Barrett.)

is on the rostrum, that's all I know.

Q. Did Dr. Matthews take X-rays of you?

A. No, sir; he didn't. [32]

Mr. Werner: Did you say yes or no?

A. No, he did not.

Mr. Moffat: Did he tell you that you had some skin infection there or skin trouble where you were losing your hair?

A. He told me that should have been opened, there was a lot of dead blood in there from an injury like that I received, and I should have surgery to open it and get this clogged-up blood that was still left in there. He said that is the reason my hair wasn't coming out.

Q. Now, was the next doctor you saw someone at the Topeka Hospital?

A. I never got to Topeka Hospital, sir. I taken this slip this doctor had gave me to Mr. Ford to the commissary to get transportation to go to Topeka.

Q. Who is Mr. Ford, is he the boss at the commissary?

A. Well, no, he's more like—his particular title, somethink like a counsellor. You go to him with all your troubles. What his position is——

Q. You don't know? A. I don't know.

Q. Well, anyway, you took the slip to Mr. Ford?

A. Yes.

Q. And what happened then?

A. Well, I just explained to him I had saw [33] Dr. Matthews and he had advised me to be sent to

(Deposition of Porter Barrett.)

Topeka Hospital for X-rays. And, well, he say I don't know why you have to go to Topeka. We have good doctors here in Chicago. I said, "Okeh, send me to some of them. What I want to know is what is causing this pain in my head."

Q. Keep your voice up.

A. I wanted to know what is wrong with my head. I said that I think I have the right to hospitalization, I would like to go to somebody who could do something for me.

Q. So did you go to see a doctor in Chicago?

A. Yes, he sent me back—overruled this doctor, wouldn't let me go to Topeka, he overruled this doctor's order that he had gave me to go to Topeka and to be examined and X-rayed, and sent me back to a company doctor, Dr. Butee's.

Q. Where was Dr. Butee's office?

A. He is located at Cermak and Indiana, 2200 something.

Q. He was a Santa Fe doctor?

A. Regular Santa Fe monthly examination doctor, he gives all the regular examinations.

Q. And what day did you go to see Dr. Butee, do you recall?

A. In April, the 22nd or 23rd, somewhere along in there, some date. I don't know the first date. [34]

Q. It was a day or so after seeing Mr. Ford?

A. Yes, sir; I probably could have gone the same day, but I don't remember whether I went the same day or not.

Q. Did Dr. Butee examine you?

(Deposition of Porter Barrett.)

A. That's right.

Q. You told him about your headaches?

A. Yes, sir.

Q. And at that time the only thing bothering you was your headaches? A. That's right.

Q. Did he take X-rays of you?

A. Yes, sir.

Q. And did he recommend that you follow any certain course of treatment?

A. Dr. Butee, that's all he done, that's all. He hadn't told me anything about the X-rays, nothing about the examination, nothing.

Q. At the time you saw Dr. Butee what was the condition of the top of your head, if you know, was your hair missing? A. Yes, sir.

Q. How big, about the size of a silver dollar, I think you said? A. That's right, sir.

Q. Now, did you see Dr. Butee again after that visit? [35] A. No, sir; I didn't.

Q. You continued working?

A. No, sir. I saw another doctor. In fact, I saw two other doctors after that.

Q. Was that at the same time?

A. During the same month, I don't know.

Q. The latter part of April?

A. Yes, in through May I saw doctors.

Q. All right. Tell me about those doctors, who they were, and so forth.

A. Well, to be truthful, I can't recall either one of them's names, but the addresses were 105 South LaSalle in downtown Chicago.

(Deposition of Porter Barrett.)

Q. Yes?

A. And he was an E.N.T. doctor. And another doctor at 104, I believe, South Michigan.

Q. Yes? A. He was an eye doctor.

Q. I see. Dr. Butee, did he send you to those fellows?

A. No, Mr. Ford sent me to those fellows.

Q. Did those doctors examine you?

A. Yes, they cleaned out my ears and my nose.

Q. Were you having some trouble with your ears at that time?

A. Not that I could recall. [36]

Q. How about your nose?

A. It never bothered me that I could tell.

Q. Were you having any sinus trouble?

A. He said I had a little, but I never noticed it.

Q. That was the E.N.T. man? A. Yes.

Q. How about your eyes?

A. He checked my eyes and all. I never saw no report or anything. I worked all along and he never told me anything.

Q. As far as you know, your eyes were all right, they weren't giving you any trouble?

A. No, this right one, yes, the right eye was giving me a little trouble after the accident.

Q. What kind of trouble was that?

A. Well, clog up, you know, with gummy stuff, you know, in the mornings and blurry like, I couldn't hardly see.

Q. Some kind of a substance in your right eye?

A. Yes.

(Deposition of Porter Barrett.)

Q. You could clean that out with a washcloth?

A. Yes, and I would use this stuff you buy at the drug store and wash it out with a cup, wash it out.

Q. When did you first notice that you were having this trouble with your eye?

A. Oh, I don't know, along the time I started going [37] to the doctors. That is the reason I asked to go to an eye doctor.

Q. About the latter half of April, is that right?

A. That's right.

Q. Did your eye clear up all right?

A. Well, I don't know. It still sticks together when I am up in the mornings, early in the mornings, and seems to be blurry like, but I don't know whether there is anything wrong with it or not.

Q. Did you tell the eye doctor in Chicago about this trouble?

A. Yes. He gave me a little tube of salve to use, you know, that's all.

Q. You say, sir, that you still have that substance in your eye each morning when you wake up?

A. That's right.

Q. Now, after seeing those two doctors, the eye doctor and the E.N.T. doctor, we have just talked about, Mr. Barrett, I imagine you went back to work or, as a matter of fact, you were probably working all the time?

A. I never stopped work. I continued to work all along. No one recommended me any relief or

(Deposition of Porter Barrett.)

anything. They just said come back tomorrow, come back tomorrow, and that was about the size of it.

Q. Then after those visits in April to those doctors, when was the next time that you saw a [38] doctor?

A. I don't believe I saw a doctor until the 17th of December.

Q. When you got off the train in Los Angeles?

A. That's right, sir.

Q. Well, how did you feel, Mr. Barrett, between that last part of April when you saw those two doctors in Chicago we have just referred to and the 17th of December, 1955?

A. Continual headaches all the time, never without them.

Q. Didn't you feel better during that time? Didn't the headaches diminish?

A. The only relief was to take Sal-fayne. That is the only relief and that was only for a little while and it would start all over again. In fact, I have one now.

Q. So who did you see on the 17th of December, 1955? A. Dr. Weaver.

Q. And what is his first name?

A. Darrington.

Q. Where is he located? A. 300—

Mr. Werner: 351 East 33rd Street.

A. 33rd Street.

Mr. Moffat: Los Angeles?

A. Yes. [39]

Q. Thank you. And why did you go see him?

(Deposition of Porter Barrett.)

A. To see if he could do anything for my headaches.

Q. Do you know if Dr. Weaver specializes in any particular field?

A. No, I never knew the doctor before then, no.

Q. And he examined you on December 17th?

A. No, I won't say he examined me, he just talked to me.

Q. Did he take X-rays of you that day?

A. No.

Q. And the only thing bothering you at that time, you still had the headaches?

A. That's right, sir.

Q. Well, what did he recommend?

A. He recommended me to another doctor.

Q. Who was that? A. Dr. Morris Goren.

Q. How do you spell that last name?

Mr. Werner: G-o-r-e-n, Morris.

Q. (By Mr. Moffat): Did you see Dr. Goren?

A. Yes, I am still seeing him, sir.

Q. When did you first start to see him, first visit him?

A. All during the holidays, somewhere along in there, I don't know the exact date. I can't remember.

Q. Did you see Dr. Weaver more than once or just [40] that time?

A. Yes, sir; I saw him more than once.

Q. Did you see him a couple of times before you went to this Dr. Goren?

(Deposition of Porter Barrett.)

A. Oh, yes, I go about three or four times a week.

Q. Well, do I understand this, Mr. Barrett, that Dr. Weaver treated you at the same time that Dr. Goren was treating you?

A. No, he never treated me for anything. He only talked to me. Well, you call this consultation, he sit and talked to me, it seemed to kind of relieve my thoughts and head and mind. Actually, he never gave me a pill.

Q. I see. So, in any event, within a few days after first seeing Dr. Weaver you went to see Dr. Goren? A. That's right, sir.

Q. Where is he located in Los Angeles, do you know?

Mr. Werner: Who?

Mr. Moffat: Dr. Goren. Maybe you can tell us, Mr. Barrett.

Mr. Werner: He is up on the corner—he is the first medical building on 6th Street, the left-hand side of the corner on top of the hill across from that girls' YMCA, you know.

Mr. Moffat: I don't know the location.

A. 1000 block west, I think. [41]

Mr. Werner: 1012, I think.

Q. (By Mr. Moffat): Something West 6th Street? A. Or 1212.

Q. When you first saw Dr. Goren did you tell him about your condition?

A. Yes, I did, sir.

Q. And he examined you? A. Yes, sir.

(Deposition of Porter Barrett.)

Q. Took X-rays? A. Yes, sir.

Q. And did you start a course of visits to his office?

A. Yes, sir, which I am still taking twice a week.

Q. Has it been pretty regularly twice a week?

A. Yes, sir.

Q. What treatment did he give you or has he given you?

A. After the X-rays he give me twice a week three different type of treatments, I take it twice a week. I took it three times. When I go there, on Tuesday and Friday, so I could have electrical treatments for my neck.

Q. Is that a heat therapy?

A. One of them is heat and one is electrical thing and the other is something you put around my head and draw me up something like this. I don't know what you call that.

Q. Has his treatment helped you? [42]

A. So far, sir, I don't see any change.

Q. I notice, and I have noticed during the questioning of you that you have been twitching your head or your head has been twitching. When did that first begin? A. Oh, about May, 1955.

Q. Your head has been twitching almost continuously through this questioning. Has it been that way since May? A. Yes, sir.

Q. Does it twitch all the time?

A. Yes, very seldom without it.

Q. Can you control it? A. No, sir.

Q. Was your head twitching as it is now when

(Deposition of Porter Barrett.)

you visited these doctors in Chicago in April of 1955? A. No, it hadn't started then.

Q. It started sometime in May and has continued all the time? A. That's right, sir.

Q. It is my impression that this twitching occurs every few seconds almost, is that the way it has been? A. That's right.

Q. You never had any discomfort, though, or pain in your neck, have you?

A. Oh, yes, sir, definitely. This right side of my neck is swollen now, it stays—he even gives [43] me shots in my neck.

Q. When did you first notice that?

A. Oh, sometime after I started this twitching I noticed my neck was swoll one morning.

Q. On the right-hand side? A. Yes, sir.

Q. Now, you have been off work since December 17th, 1955, is that right? A. Yes, sir.

Q. What have you been doing generally since that time? Have you taken another job?

A. No, not anything at all.

Q. Do you feel able to work?

A. I don't know. I worked all this time for the Santa Fe in this condition, so I don't know whether I could work or not.

Q. Have you ever been convicted of a felony?

A. Why you ask?

Q. Well, just my curiosity.

A. Yes, I have.

Q. Can you tell me when that was?

A. 1935.

(Deposition of Porter Barrett.)

Q. And where were you arrested?

A. Los Angeles here.

Q. By what police department?

A. Los Angeles, I imagine. [44]

Q. And were you using the name of Porter Barrett at that time? A. That's right.

Q. And what was the crime? A. A.D.W.

Mr. Werner: A what?

A. Assault with a deadly weapon.

Q. (By Mr. Moffat): And were you confined in a jail or prison or something for some period of time?

A. Awhile, yes.

Q. Can you tell me what institution you were confined in? A. Do I have to answer?

Mr. Werner: Yes, you have to answer it. Really you are only entitled to ask whether he has been convicted of a felony.

Mr. Moffat: Let me explain why I have asked these other questions. A felony sometimes is misunderstood and I have found, Mr. Werner, that sometimes men think they have been convicted of a felony and it wasn't a felony. I don't want to pry into his life. I hope you understand that.

Mr. Werner: Well, I will ask that the questions be limited then. You have enough information.

Mr. Moffat: Well, yes.

Mr. Werner: I ask that other than the answer of the [45] fact that he has been convicted be stricken from the record as incompetent, irrelevant and immaterial.

(Deposition of Porter Barrett.)

Mr. Moffat: Well, I won't agree to that, but your objection is certainly noted.

Mr. Werner: I think you are entitled to ask him whether he has been convicted of a felony. There is no doubt about that.

Mr. Moffat: Yes, I know that. I didn't want to pry. I have found sometimes that the crime was not a felony. That is why I was asking.

Q. Now, Mr. Barrett, you fractured your skull in 1954, didn't you? A. 1955, sir.

Q. Where did that take place?

A. Aboard the train.

Q. Didn't you fracture your skull in 1954?

A. No.

Q. Well, is it your testimony, sir, that you sustained no injury to your head in 1954 at all?

A. 1954?

Q. Yes. You can take a moment to think about it if you want.

Mr. Werner: I want you to answer this truthfully. If you were in another accident where you were injured, your head, I want you to be sure to reveal it here.

A. 1954? No, I haven't had no collision in [46] 1954.

Q. (By Mr. Moffat): Let me ask you this: Previous to this accident on March 11, 1955, had you ever suffered an injury to your head? A. No.

Q. Now, so we understand each other, I am asking you if you ever suffered an injury to your head of any kind prior to March 11, 1955, and I include

(Deposition of Porter Barrett.)

in that, Mr. Barrett, any injury whether it was on duty with the Santa Fe or while you were off duty?

A. I have never had any head injury before.

Mr. Werner: All right now. You understood that question? I don't care where it might have occurred. I want you to answer that correctly.

A. Prior to my injury aboard the train I have never had a lick in my head.

Mr. Werner: Never had?

A. No.

Mr. Werner: You are certain about that?

A. Definitely.

Mr. Werner: Well, it is very important to your case that you reveal it if it is true that you did have.

A. No, no, definitely not. I have no head injury prior to this.

Q. (By Mr. Moffat): Did you ever——

Mr. Werner: You don't mind my interrupting, because it is important to me. It would be a distinct surprise. [47]

A. Definitely not. I have never had any head injuries.

Mr. Werner: I want Mr. Barrett to know that the greatest danger from a question of that kind is not to reveal the truth.

A. Well, I have never had a head injury prior to this.

Mr. Werner: All right. As long as you understand it, and we are all agreed on this.

Q. (By Mr. Moffat): Now, prior to this acci-

(Deposition of Porter Barrett.)

dent of March 11, 1955, Mr. Barrett, had you ever had any difficulty with your right eye?

A. I don't recall, no.

Q. No difficulty at all? A. No, sir.

Mr. Werner: Well now, there again did you ever go to any doctor of the Santa Fe?

A. Yes.

Mr. Werner: Or any other doctor on account of your eye? I don't care whether there was a cinder in the eye—— A. Yes.

Mr. Werner: Oh, you don't have cinders any more, do you?

Mr. Moffat: Not supposed to.

Mr. Werner: Pardon me. Did you have them remove anything from your eye? [48]

A. Yes.

Mr. Werner: You have had that done?

A. This eye here, I don't know what you call it, at the Santa Fe Hospital.

Mr. Moffat: Keep your voice up.

A. Santa Fe Hospital has a record, they taken something off the lid of my eye.

Q. (By Mr. Moffat): You are indicating your left eye? A. Yes.

Mr. Werner: All right.

Q. (By Mr. Moffat): No difficulty with the right eye, though? A. Not that I remember, sir.

Q. Now, when did you have mumps?

A. I think in '54, wasn't it '54?

Q. You were hospitalized, weren't you, for

(Deposition of Porter Barrett.)

mumps? A. Yes, sir.

Q. At the Santa Fe Hospital in Los Angeles?

A. Well, through them into the County, yes. They don't have a County disease ward there. They put me in the County.

Q. That is the Los Angeles County Hospital?

A. That's right, sir.

Q. And did you have any after effects from the mumps, Mr. Barrett, after you had left the hospital? A. No after effects, no. [49]

Q. You know what I mean by after effects, did you have dizzy spells or headaches or pains of any kind? A. No.

Q. As far as you know you recovered completely? A. That's right.

Q. You had no complaints related to the mumps?

A. No, none at all.

Q. You had syphilis, did you not? A. No.

Q. You have never had syphilis? A. No.

Q. Have you ever been treated for any kind of a venereal disease?

A. No more than the mumps.

Q. Well, you say no more than the mumps. You mean you never have been treated for any venereal disease? A. No.

Mr. Werner: Did you get that answer? He shook his head.

Q. (By Mr. Moffat): As far as you know, you have never had a venereal disease such as syphilis?

A. No, sir.

Q. Well, for what illnesses did Dr. Bernard

(Deposition of Porter Barrett.)

Jacobs, your so-called family doctor, treat you before this accident of March 11th?

A. I don't think Dr. Jacobs gave me any kind of [50] treatments that I can remember. He just recommended me what I should do. He never treated.

Mr. Werner: He isn't referring particularly to this one visit. I think he is alluding to any other illness that he may have treated you for prior to this time. Is that correct, Mr. Moffat?

Mr. Moffat: Yes. I wanted to find——

A. I think I went for a cold, I went to him for a cold once, or virus X, whatever you call it, just a cold, and he gave me some penicillin shots.

Q. (By Mr. Moffat): Have you ever had any trouble with your knees?

A. Yes, I did. I had this—I don't remember what knee, I think the left knee. I was in the Santa Fe Hospital with it, oh, back in '48, I don't know, '49, some place back in there. I don't recall.

Q. What was the reason, did you have pain in your knee or did you have an injury to your knee?

A. No, no injury. It was just, I don't know, I got full of cold in Chicago, I put it down for cold, I stepped out of a cab and got snow all in my shoes and my sock got wet before I got to the hotel, and I just figured it was cold in my knee, but it begin to bother me a little bit so I went to Santa Fe Hospital. They treated me for it over there.

Q. (By Mr. Moffat): That is the Santa Fe Hospital [51] in Chicago?

A. No, here.

(Deposition of Porter Barrett.)

Q. In Los Angeles? A. Yes.

Q. Now, before this accident of March 11th, 1955, had you ever had headaches?

A. Oh, I think we all have a little headache now and then, but not consistent like I have.

Q. Nothing like the headaches you had after the accident?

A. No, I have them now and they have been with me ever since. I never did get up too much in the night before and have a headache, but I would take an Anacin or aspirin and it's all over with. But I have taken a drug store full of Anacin and, in fact, the doctor told me not to take any more.

Q. Have you ever received any treatment from a psychiatrist, Mr. Barrett?

A. I don't know. I have gone to another doctor, but I don't know what he was.

Q. Who was that doctor?

A. Dr. Goren sent me to another doctor out on Wilshire. I don't know what his title was.

Mr. Werner: He is a psychiatrist.

Mr. Moffat: He is a psychiatrist?

Mr. Werner: Yes. [52]

Q. (By Mr. Moffat): What is his name?

A. I don't remember.

Mr. Moffat: Can you tell us?

Mr. Werner: I don't know. Don't you know his name? Just a minute. Maybe I have it.

Mr. Moffat: Take a look and see.

A. I think Dr. Goren gave me a card for it the day I went out there, if I still have it.

(Deposition of Porter Barrett.)

Mr. Werner: Is this it, Milton D. Heifetz?

A. That sounds like it.

Mr. Werner: I have got a report here.

A. 63 something Wilshire Boulevard.

Mr. Werner: Yes, 6300 Wilshire Boulevard.

A. That's it.

Mr. Moffat: That is a big medical building out there.

Q. Are you still a member of the Santa Fe Coast Lines Hospital Association?

A. I would say no, sir, because my last work was out of the east, so they have a separate deal there that your dues are supposed to be paid from one end. In other words, if I am working out of Chicago I am supposed to pay my hospitalization there. This is the way I understand it, so I don't think that——

Q. You don't think you are a member out here?

A. No. [53]

Q. You think the reason is that your dues go through Chicago in some way?

A. That is what they explained to me out there, sir. I went up and talked to some fellow in the office and he explained to me by working on the Super Chief the lay-off is in Chicago, therefore, that made me a Chicago man and my dues were paid out through the east there and I wasn't entitled to any hospital association out here.

Q. Now, did you see any doctors or visit any hospitals between April, the latter part of April, 1955, and December 17th, 1955? A. No, sir.

(Deposition of Porter Barrett.)

Q. You worked steadily during that time?

A. I say the last doctors I saw was during the month through April and May there at 105 South La Salle in Chicago. This doctor, I don't recall his name, after I stopped going to him I didn't see any other doctors.

Q. All right. Are the headaches that you have had over these past months, Mr. Barrett, do they come for a while and go away or do they stay with you constantly?

A. I am never without them, sir.

Q. Never without them? A. No.

Q. How many visits have you made to this Dr. Heifetz out on Wilshire Boulevard? [54]

A. Once.

Q. Pardon? A. Just once.

Q. Did he give you any type of electric or insulin shock treatment? A. No.

Q. Now, in let's say the year preceding this accident, I mean the year before the accident of March 11, 1955, had you received medical treatment from any doctors aside from the mumps I think you mentioned in 1954?

A. I don't remember any. If it was, probably for a cold, something like that, nothing serious.

Q. And you have never injured your head in any fashion before this accident of March 11th?

A. No, sir.

Q. Now, have you ever filed a lawsuit for personal injuries to yourself prior to this suit?

A. Never in my life, sir.

(Deposition of Porter Barrett.)

Q. I take it, too, that you never filed a claim for personal injuries?

A. No, sir; nothing.

Q. And prior to this accident of March 11th, 1955, I take it you had never been in an accident where your body or your person had been injured, am I right?

Mr. Werner: Now, we want—I don't care what kind of accident it was, I want you to reveal any sort of [55] accident wherein you might have injured yourself. I don't care whether, if you can recall it, slipping on the floor or in the bathtub or——

A. No.

Mr. Werner: The harm of a question of that kind and answer is not to reveal the truth and that's all we want here. I am sure that's all Mr. Moffat wants.

A. If you consider, I had a piece of ice to fall on my foot.

Mr. Werner: Well, all right.

Q. (By Mr. Moffat): Did you hurt your foot?

A. I broke a little toe.

Q. Aside from that no other injuries?

A. No, sir.

Mr. Werner: You know a lot of people have accidents and all that is necessary is to reveal the truth now, no harm comes from that.

A. No.

Mr. Werner: Because we all have accidents of that nature.

Q. (By Mr. Moffat): Since you took off work

(Deposition of Porter Barrett.)

on December 17th, 1955, you stated, I think, that you had no other job? A. No, sir.

Q. Up to now, and I imagine you have received no other wages or money of that kind?

A. No. [56]

Mr. Moffat: I am sorry to be so long. I think I will be through in just a moment.

Mr. Werner: You just take your time.

Mr. Moffat: Thank you.

Mr. Werner: I came prepared to stay for the morning.

Q. (By Mr. Moffat): Do you feel nervous about yourself since the accident?

A. Well, sir, I don't know exactly how to put it, whether it would be nervous or lack of memory or something. I don't know, because a lot of times I would be laying something down right this minute and the next minute I don't know where I put it. I don't know whether you call that nervousness or lack of memory, I don't know.

Q. When did you separate from your wife? Oh, I think you told me, I am not certain. I don't want to ask the same question again. I have forgotten, though. Do you recall?

A. Oh, I am sorry. I didn't know——

Q. Do you recall the approximate time? I may have asked you this.

A. You did, sir. We separated in '50 or '49, something like that, I don't know.

Q. Have you ever been hospitalized in any hos-

(Deposition of Porter Barrett.)

pitals in Los Angeles other than the Santa Fe Hospital? A. Yes, sir.

Q. And the General Hospital? [57]

A. Good Samaritan up here on the hill, is that the Good Samaritan?

Mr. Werner: Yes, I think that is it.

A. Appendix removed.

Mr. Werner: You had a what?

A. Appendix.

Mr. Werner: At Santa Fe? A. No.

Q. (By Mr. Moffat): That was before you worked for Santa Fe? A. Yes.

Q. Aside from that, no other hospitalization?

A. No, sir.

Mr. Moffat: Well, I think that's all.

Mr. Werner: Well, just one question. I don't usually ask questions.

Cross-Examination

By Mr. Werner:

Q. You were asked whether you made a report to the steward. Did you at that time discuss the making of the report for the purpose of protecting this other employee? A. No.

Q. You didn't?

A. No, at that time just make out a regular—you see, they have a form, regular accident report. [58]

Q. Yes. What was the accident?

A. It doesn't cover——

(Deposition of Porter Barrett.)

Q. What?

A. It say how the accident happened, it's all that is supposed to be. I don't think his name was mentioned. I don't think his name was mentioned. I don't know, I really don't know whether his name was mentioned or not. I truthfully don't know, but the accident report was made out, whether his name was mentioned.

Q. Well, in that report was there anything said about the movement of the train?

A. I believe it was, yes.

Q. What was said?

A. I don't know what particular words he wrote down there but I think he did say that some motion of the train caused this door to close. I believe it was put in there.

Q. Did he say why he was putting that in there?

A. Yes.

Q. Why?

A. To try to protect this other fellow's job.

Mr. Werner: I just wanted that to come in so it wouldn't be an afterthought.

Mr. Moffat: There is always an afterthought. I might ask some on that. [59]

Redirect Examination

By Mr. Moffat:

Q. Did you read the report, sir, the accident report that Mr. Werner asked you about?

A. No, sir; I didn't read it.

(Deposition of Porter Barrett.)

Q. Did you sign the report?

A. Yes, sir. He asked questions and write down. He asked questions and he write and he asked questions and he write, but when he get through we were sitting now at a table and when we get through I just sign it. I couldn't read back the report. I knew a few questions he did ask me, how did it happen.

Q. Well, are you saying, Mr. Barrett, that the steward wouldn't let you read that report?

A. Oh, no, definitely not; no.

Q. You just didn't—

Mr. Werner: Take the trouble?

Mr. Moffat: Take the trouble to read it?

A. No, it is there for you to read, sir.

Q. Did you fill out a report in your own handwriting? A. No.

Q. And you say that the steward suggested that the report say that the accident happened because of the movement of the train, is that the steward's suggestion? A. Those are his words.

Q. Those are the steward's words? [60]

A. Yes.

Q. Can you tell me exactly what he said to you or as near as you can recall?

A. I won't say word by word. I can't tell you exactly, sir, no.

Q. Tell me in substance what you recall him saying to you about this aspect of the report.

A. Well, he asked me how did it happen and all that, the time, and all the procedure of the accident,

(Deposition of Porter Barrett.)

and what should we put down here how it happened. So——

Q. Let me interrupt you for a minute. Did you then tell him how it happened?

A. Definitely.

Q. Did you tell him the same version that you told us here today? A. Yes, he understood.

Q. What did he say to you?

A. If my memory serves me kind of right, I don't know correctly, it has been so long.

Q. I understand that.

A. He said should maybe—maybe we shouldn't put down that Al Williams slammed this door in your head because he might lose his job behind this, so we'll put down the swaying of the train caused the door to slam on your head. I said okeh, it don't matter to me, so the report is written up something like that. I really [61] don't know word for word, you know, what was said. And I just agreed to what he said. I was thinking, too, of this man's job at the same time.

Q. Who was Hog Head?

A. I beg your pardon?

Q. Who is Hog Head? Is that a nickname for anybody?

A. Hog Head is the engineer, as far as I know, on a train.

Q. That is the nickname for the engineer?

A. Yes.

Mr. Moffat: Do you have a question?

Mr. Werner: No, I don't think so.

Mr. Moffat: Thanks very much. I didn't mean to take so long.

/s/ PORTER BARRETT,
Witness. [62]

State of California,
County of Los Angeles—ss.

I, Wertie Clarice Weaver, Notary Public in and for the County of Los Angeles, State of California, do hereby certify:

That on the 18th day of April, 1956, before me personally appeared Porter Barrett, the witness whose deposition appears hereinbefore.

That the said witness was by me duly advised of the right to make such changes and corrections in the within transcript as might be necessary in order to render the same true and correct;

That the said witness stated to me that the said deposition had been read to or by him, and he, having made such changes and corrections as he desired thereupon, subscribed and swore to the said deposition in my presence;

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office the date hereinabove written.

[Seal] /s/ WERTIE CLARICE WEAVER,
Notary Public in and for the County of Los Angeles, State of California. [63]

Certificate

State of California,
County of Los Angeles—ss.

I, E. S. Brink, Notary Public in and for the County of Los Angeles, State of California, do hereby certify:

That I am a Certified Shorthand Reporter, duly licensed and qualified by the State of California.

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify the truth, the whole truth and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place herein named and was thereafter reduced to type-writing under my direction.

That at the conclusion of the taking of said deposition it was stipulated by and between respective counsel herein that when reduced to writing, said deposition might be read over by the witness and if necessary, corrected and then signed before any duly qualified Notary Public, and if not signed by the witness, the deposition might be used with the same force and effect as though signed.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 14th day of March, 1956.

[Seal] /s/ E. S. BRINK,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed May 22, 1956. [64]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause;

A. The foregoing pages, numbered 1 to 93, inclusive, containing the original:

Verdict;

Judgment on Verdict;

Motion and Notice of Motion for Relief From Judgment;

Brief and Points and Authorities in Support of Motion for Relief From Judgment;

Affidavits of William Perry, George Franklin Richcreek, Joe Wilson Elliott, John G. Zelezny, Alice Madsen, Louis M. Welsh;

Brief and Affidavits against Motion for Relief From Judgment;

Affidavits of Arnold G. Roberts, Lemaud J. Nash, Rhodes Robinson, Walter Bozeman, Jesse Mitchel, Richard Goldsmith, Calvin Davis, Darrington Weaver, M.D., Porter Barrett;

Affidavit of John B. Doyle, M.D.;

Order on Defendant's Motion Under 60(b), F. R. C. P.;

Notice of Appeal;

Designation of Record on Appeal;

Application for Order to Extend Time for
Filing Record on Appeal and Order Thereon;

and a full, true and correct copy of Executive Department of the State of California Pardon;

B. Two volumes of Reporter's Official Transcript of Proceedings had on May 22, 1956, and September 10, 1956;

C. The deposition of Porter Barrett;

D. Defendant's exhibits 1 through 7, inclusive.

I further certify that my fees for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court this 5th day of November, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the supplemental transcript of record on

appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages, numbered 1 to 25, inclusive, containing the original:

Amended Complaint;

Answer to Amended Complaint;

Reply to Plaintiff's Opposition to Motion for Relief From Judgment;

Ex Parte Order to Stay Proceedings to Enforce Judgment;

Notice of Motion for Supersedeas;

Affidavit of Service of Ex Parte Order to Stay Proceedings to Enforce Judgment;

Order to Stay Proceedings to Enforce Judgment.

Witness my hand and seal of the said District Court this 7th day of December, 1956.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15348. United States Court of Appeals for the Ninth Circuit. The Atchison, Topeka and Santa Fe Railway Company, a Corporation, Appellant, vs. Porter Barrett, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 6, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

1861

1. The first of the year was a very cold day, with a heavy frost, and a strong wind from the north.

2. The second day was a very cold day, with a heavy frost, and a strong wind from the north.

3. The third day was a very cold day, with a heavy frost, and a strong wind from the north.

4. The fourth day was a very cold day, with a heavy frost, and a strong wind from the north.

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10. The tenth day was a very cold day, with a heavy frost, and a strong wind from the north.

11. The eleventh day was a very cold day, with a heavy frost, and a strong wind from the north.

12. The twelfth day was a very cold day, with a heavy frost, and a strong wind from the north.

13. The thirteenth day was a very cold day, with a heavy frost, and a strong wind from the north.

14. The fourteenth day was a very cold day, with a heavy frost, and a strong wind from the north.

15. The fifteenth day was a very cold day, with a heavy frost, and a strong wind from the north.

16. The sixteenth day was a very cold day, with a heavy frost, and a strong wind from the north.

17. The seventeenth day was a very cold day, with a heavy frost, and a strong wind from the north.

18. The eighteenth day was a very cold day, with a heavy frost, and a strong wind from the north.

19. The nineteenth day was a very cold day, with a heavy frost, and a strong wind from the north.

20. The twentieth day was a very cold day, with a heavy frost, and a strong wind from the north.

21. The twenty-first day was a very cold day, with a heavy frost, and a strong wind from the north.

22. The twenty-second day was a very cold day, with a heavy frost, and a strong wind from the north.

23. The twenty-third day was a very cold day, with a heavy frost, and a strong wind from the north.

24. The twenty-fourth day was a very cold day, with a heavy frost, and a strong wind from the north.

25. The twenty-fifth day was a very cold day, with a heavy frost, and a strong wind from the north.

26. The twenty-sixth day was a very cold day, with a heavy frost, and a strong wind from the north.

27. The twenty-seventh day was a very cold day, with a heavy frost, and a strong wind from the north.

28. The twenty-eighth day was a very cold day, with a heavy frost, and a strong wind from the north.

29. The twenty-ninth day was a very cold day, with a heavy frost, and a strong wind from the north.

30. The thirtieth day was a very cold day, with a heavy frost, and a strong wind from the north.

31. The thirty-first day was a very cold day, with a heavy frost, and a strong wind from the north.